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Supreme Court, U.S.
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CLERK

*NO.* _____

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

OHIO CITIZENS FOR
RESPONSIBLE ENERGY, INC.,

*Petitioner,*

*vs.*

NUCLEAR REGULATORY COMMISSION and
THE UNITED STATES OF AMERICA

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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February 20, 1987

## QUESTION PRESENTED FOR REVIEW

Whether an order of the Nuclear Regulatory Commission which denies an intervenor its right to participation in adjudicatory proceedings before the issuance of a full-power operating license is a "final order" for purposes of review by the court of appeals?

## PARTIES TO THE PROCEEDINGS

PETITIONER:

Ohio Citizens for Responsible Energy, Inc.

RESPONDENTS:

United States Nuclear Regulatory Commission

United States of America

INTERVENORS:

Cleveland Electric Illuminating Company

Duquesne Light Company

Ohio Edison Company

Pennsylvania Power Company

Toledo Edison Company

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IN THE SUPREME COURT OF THE
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OHIO CITIZENS FOR
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vs.

NUCLEAR REGULATORY COMMISSION and
The UNITED STATES OF AMERICA,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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The petitioner, The Ohio Citizens for Responsible Energy, Inc. (OCRE)[1], respectfully prays that a writ of certiorari issue to review the 2-1 decision of

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[1]Petitioner, OCRE, is a private, non-profit corporation organized under the laws of the State of Ohio. OCRE states that it has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 14, 1986.

## OPINIONS BELOW

On September 4, 1986, the Court of Appeals issued an order staying a vote by the Nuclear Regulatory Commission (NRC) on the issuance of a full-power operating license for the Perry Nuclear Power Plant and the order is unpublished. The Opinion of the Court of Appeals was entered on October 14, 1986, and is published at 803 F.2d 258 (6th Cir. 1986). Following petitioner's application for rehearing en banc, the Court of Appeals denied the application on November 25, 1986, and the order is unpublished. The Opinion and Orders are reproduced in the Appendix hereto, at A-1-12.

The NRC decision reviewed was issued on April 18, 1986. The decision is published at 23 NRC 233. The decision is reproduced in the Appendix hereto at B-1-17.

## JURISDICTION

The final judgment that is the focus of this petition was entered on November 25, 1986.

The jurisdiction of the Court rests upon Title 28 U.S.C. Section 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved in this case are set forth in Appendix C-1-5. Those being referred to are:

1. 28 U.S.C. § 2342(4)
2. 42 U.S.C. § 2239(a)

## STATEMENT OF THE CASE

The Cleveland Electric Illuminating Co. (CEI) filed its operating license application for the Perry Nuclear Power Plant Units 1 and 2 (Perry) with the NRC on June 26, 1980. In February 1981, the NRC published notice of "Receipt of Application for Facility Operating Licenses, Consideration of Issuance of Facility Operating Licenses, and Opportunity for Hearing."[2] This notice provided an opportunity for any person whose interest might be affected by the proceeding to request a hearing and file a petition for leave to intervene.

By order dated July 28, 1981[3] the Atomic Safety and Licensing Board (Licensing Board) made determinations

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[2] 46 Fed. Reg. 12,372 (February 13, 1981).

[3] Cleveland Electric Illuminating Co., (Perry Nuclear Power Plant, Units 1 and 2, 14 NRC 175 (1981).

concerning party status. OCRE and a number of other individuals and groups were granted party status as intervenors in the licensing proceedings.[4]

The proceeding before the Licensing Board of the NRC was conducted pursuant to Section 189(a) of the Atomic Energy Act. 42 U.S.C. § 2239(a). The proceedings concerned CEI's application for an operating license for its two 1205 MWe boiling water reactors for the Perry Plant located in Lake County, Ohio, approximately 35 miles northeast of Cleveland, on the shores of Lake Erie. The hearing record before the Licensing Board was closed on May 3, 1985.

At 11:46 a.m. E.S.T. on January 31, 1986, an earthquake of magnitude 5.0 occurred 10 miles south of the Perry Plant. The earthquake was felt 300

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[4] 14 N.R.C. 175.

miles away and there were reports of cracked walls, shattered windows, and falling roof tiles near the epicenter of the earthquake. There were several aftershocks which were recorded.

A. ADMINISTRATIVE PROCEEDINGS

On February 3, 1986, petitioner filed a Motion to Reopen the Record and Submit a New Contention with the Atomic Safety and Licensing Appeal Board (Appeal Board). OCRE sought to reopen the record for the purpose of submitting and litigating one contention regarding the inadequacy of the seismic design of the Perry Plant in light of the local earthquake.[5] Prior to the unexpected seismic activity, the earthquake conten-

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[5]The contention proposed by OCRE was as follows:

"Applicants have not demonstrated that the seismic design of the Perry Nuclear Power Plant is adequate in light of observed local seismicity."

[Footnote continued, next page]

tion was not an issue and therefore not reviewed by the Licensing Board during the period the record was being developed before the agency.

The Appeal Board issued a Memorandum and Order (unpublished) to hold a hearing with a limited purpose, "...to aid our determination on whether there is warrant to reopen the record for the admission and full litigation of OCRE's newly proposed seismic contention...".

The Appeal Board determined OCRE had good reason to file its motion before the implications of the earthquake on the nuclear facility could be ascertained. "[I]t was enough for OCRE to call attention to the apparent fact that the earthquake exceeded the design basis

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[footnote continued]
OCRE based its contention on preliminary information. At the time of the filing of the Motion, detailed information regarding the seismic activity was still lacking.

SSE (Safe Shutdown Earthquake) in at least one respect."

The Appeal Board determined OCRE presented "evidence of a significant safety matter...". The Appeal Board however determined it was "difficult to make an informed judgment on the basis of preliminary written materials where, as here, the combined and complicated fields of geology, seismology, and engineering mechanics come into play." The Appeal Board had several questions which it felt required further explanation before it could decide with confidence whether the reopening of the record would be justified.

On April 18, 1986, the Commission of the NRC, sua sponte, issued an order vacating the March 20 Appeal Board Order and denying OCRE's motion; the Commission held if the Appeal Board "was not convinced that the motion raised a

matter of safety significance, it should have denied the motion to reopen." Appendix B at 4. In vacating the Appeal Board's order to hold exploratory hearings and denying OCRE's motion to reopen the proceedings, the Commission determined matters could be addressed by the staff outside of the adjudicatory context. The Commission further decided the earthquake had already received a great deal of attention by the NRC staff. Appendix B at 7.

On August 13, 1986, the Commission published notice in the Federal Register that a discussion and possible vote on the full-power operating license for the Perry Plant would be held on September 5, 1986.[6] On August 27, OCRE filed a Motion for a Continuance of the briefing and vote with the Commission

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[6] 51 Fed. Reg. 29,043 (August 13, 1986).

and the motion was denied on September 4, 1986.

B. COURT OF APPEALS PROCEEDINGS

On April 23, 1986, pursuant to 28 U.S.C. § 2342(4) ("Hobbs Act"); 28 U.S.C. § 2343; and 42 U.S.C. § 2239(a), OCRE filed a Petition for Review in the United States Court of Appeals for the Sixth Circuit. OCRE alleged in its petition, inter alia, that the NRC violated section 189(a) of the Atomic Energy Act of 1954 [42 U.S.C. § 2239(a)] by summarily denying the petitioner a hearing on an issue of material safety significance regarding the licensing of the Perry Plant. OCRE requested the Court of Appeals remand the matter to the Appeal Board with an order to reopen the record and hold a hearing on the new contention or, in the alternative, reinstate the order of the Appeal Board

to hold a "mini hearing" on the earthquake issue.

The NRC scheduled a vote on the issuance of a full-power operating license for Perry and after requesting a continuance on the vote from the NRC, the petitioner filed an Emergency Motion in the Court of Appeals to stay the briefing and possible vote scheduled for September 5, 1986 by the Commission. On September 4, 1986, the Court of Appeals stayed "any possible vote" on the issuance of a full-power operating license for the Perry Plant by the NRC. Appendix A at 2.

On October 14, 1986, the Court of Appeals held it did not have jurisdiction to entertain the petition for review until a final order was issued by the agency. The Court concluded, "in licensing proceedings before the NRC, a final order is the order granting or

denying a license. Appendix A at 8. OCRE filed a Petition for Rehearing en banc on October 23, 1986 and the Court of Appeals denied the petition on November 25, 1986.[7]

The petitioner filed an Application To Stay Mandate of the United States Court of Appeals for The Sixth Circuit in this matter in the Supreme Court on January 6, 1987. The petitioner sought to stay full-power operations of Perry pending certiorari proceedings in this Court. On January 8, 1987, Justice Antonin Scalia, as Circuit Justice for the Sixth Circuit, denied the stay

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[7]On November 13, 1986, the NRC staff issued the full-power operating license for Perry. On the same date, the Court of Appeals for the Sixth Circuit stayed full-power operation of Perry in State of Ohio, ex rel. Celebrezze v. NRC, 86-4019 (6th Cir. filed Nov. 7, 1986). On November 14, the petitioner filed a Petition for Review with the Sixth Circuit. Ohio Citizens for Responsible Energy v. NRC, No. 86-4037 (6th Cir. filed Nov. 14, 1986). On the same date, [Footnote continued, next page]

application by endorsed order. Ohio Citizens for Responsible Energy v. Nuclear Regulatory Commission, et al., A-499 (January 8, 1987).

## REASONS FOR GRANTING THE WRIT

This Court should grant the petition for writ of certiorari. The Court of Appeals has jurisdiction under the "Hobbs Act" to review "final orders" arising out of proceedings involving the granting, suspending or amending of licences under the Atomic Energy Act. This Court has not defined "final order"

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[footnote continued]
the State of Ohio filed a second Petition for Review. State of Ohio, ex. rel. Celebrezze v. NRC, No. 86-4038 (6th Cir. filed Nov. 14, 1986). The Court of Appeals consolidated all three matters and heard arguments on December 3, 1986. On December 23, 1986, the Court of Appeals lifted the stay on full-power operation of Perry. As of the filing of this petition, the Sixth Circuit has not issued on opinion in the above matters.

under the "Hobbs Act" and the holding of the court below is in conflict with a holding of the Third Circuit which determined what a "final order" is under the "Hobbs Act" for purposes of review by the courts of appeals.

Second, the Court of Appeals did not apply the "collateral order" doctrine to the facts and circumstances of the instant matter. The Court of Appeals was in a position to maintain jurisdiction over the petition for review and decide the merits of the petitioner's claim prior to the issuance of the full-power operating license for the Perry Plant.

(A) THE APRIL 18, 1986 ORDER OF THE COMMISSION OF THE NRC WHICH DENIED THE PETITIONER A HEARING BEFORE THE AGENCY ON A SAFETY SIGNIFICANT MATTER, WAS A "FINAL ORDER" FOR PURPOSES OF REVIEW BY THE COURT OF APPEALS.

The Court of Appeals has jurisdiction to review "final orders" arising out of

proceedings involving the granting, suspending or amending of licenses under the Atomic Energy Act pursuant to 28 U.S.C. § 2342. 28 U.S.C. § 2342 is known as the Administrative Orders Review Act or the "Hobbs Act".

The Administrative Orders Review Act provides "The Court of Appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or determine the validity of -- (4) all final orders of the Atomic Energy Commission made reviewable by [section 189(a) of the Atomic Energy Act]." 28 U.S.C. § 2342(4). 28 U.S.C. § 2342(4) applies to the Nuclear Regulatory Commission. 42 U.S.C. § 5871(g) (1982).

The majority below determined in "licensing proceedings before the NRC, a final order is the order granting or denying a license." Appendix A-8. This conclusion is contrary to the term

"final order" as defined by the Third Circuit under the "Administrative Orders Review Act". 28 U.S.C. § 2342.

In Citizens For a Safe Environment v. AEC, 489 F.2d 1018 (3rd Cir. 1974), the petitioners sought review of the Commission denial of their request for financial and technical assistance. The court determined "[n]ormally in an adjudication a final order is one that disposes of all the issues as to the parties." Id. at 1021. Five years later, the Third Circuit was faced with a similar situation and took that opportunity to define "final order" when it was asked to dismiss a matter for want of jurisdiction.

The Third Circuit, in Westinghouse Electric Corp. v. U.S. Nuclear Regulatory Commission, 598 F.2d 759 (3rd Cir. 1979), found the term "final order" to be broader in scope than the court

below held. The court, citing Writers Guild of America v. FCC, 423 F. Supp. 1064, 1079 (C.D. Cal. 1976), adopted the view that a final order under the Administrative Orders Review Act has never been interpreted to include the culmination of all agency action. Westinghouse Electric, 598 F.2d at 765-766, n. 21. The court also found a "final order" to be one which contained the "essential attributes of finality". Id. at 768, n. 35. "A final order need not necessarily be the very last order in the agency proceeding," so long as it attaches consequences or harm to the petitioner. Isbrandtsen v. United States, 211 F.2d 51, 55-56, (D.C. Cir. 1954), cert. denied, 347 U.S. 900 (1954).

In Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971), the petitioners sought review of

the Secretary of Agriculture's refusal to act and the inadequate explanation for his decision. The court found the "denial was reviewable as a final order because of its immediate impact on the parties". Id. at 589. "The test of finality for purposes of review is not whether the order is the last administrative order contemplated by the statutory scheme, but rather whether its impact imposes an obligation or denies a right with consequences sufficient to warrant review." Id.

When looking to finality of an order, courts have looked to whether judicial review would disrupt the orderly process of adjudication; Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970); or whether the order imposed "an obligation, den[ied] a right or fix[ed] some legal relationship as a consum-

mation of the administrative process". Chicago & Southern Airlines v. Waterman Steamship Corp., 333 U.S. 103, 113 (1948); see also Honicker v. NRC, 590 F.2d 1207, 1209 (D.C. Cir. 1978) cert. denied 441 U.S. 906 (1979). "A final order need not necessarily be the very last order in the agency proceeding," so long as it attaches consequences or harm to the petitioner. Isbrandtsen v. United States, 211 F.2d 55-56.

This Court has granted certiorari in matters because of "a conflict among the Circuits in order to resolve conflicts on important questions; Aldinger v. Howard, 427 U.S. 1,3 (1976), or because of a question of important statutory construction. See Shapiro v. United States, 335 U.S. 1,4 (1948); Minnesota Mining Co. v. New Jersey Wood Co., 381 U.S. 311, 314 (1965). See also Florida Power and Light Co. v. Lorion, 466 U.S.

____, 104 S. Ct. 1676, 1677 (1984). There is a need for a uniform rule on this point and this Court has granted certiorari in order to establish such. Commission v. Bilder, 369 U.S. 499, 501 (1962).

This Court recently had an opportunity to consider the "Hobbs Act" in Florida Power & Light Co. v. Lorion. ___ U.S. ___, 105 S. Ct. 1598 (1985). The Court was asked to determine whether the Hobbs Act vested exclusive jurisdiction in the courts of appeals to review all final orders of the NRC made reviewable by 42 U.S.C. § 2239. This Court however never defined what constituted a "final order" of the NRC for purposes of review by the courts of appeals.

The petitioner contends the April 18, 1986 Order of the Commission was a "final order" of the NRC. The order was

not the last order in all the proceedings before the agency but that, in and of itself, does not deprive the court of appeals of jurisdiction.

The relief the petitioner is seeking from this Court is to be given the opportunity to be heard as provided in the Atomic Energy Act. The petitioner seeks review in this Court, because the Commission Order has all the attributes of finality: it was issued after the record was closed; it deprives the petitioner of its right to participate in an adjudicatory proceeding; and harm and consequences attach to OCRE as a result of the Order.

(B) THE APRIL 18, 1986 ORDER OF THE COMMISSION IS REVIEWABLE BY THE COURT OF APPEALS UNDER THE "COLLATERAL ORDER" DOCTRINE.

The April 18, 1986 Order of the Commission is appealable under the

"collateral order" doctrine as outlined in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). A decision is appealable if the claims are separable from and collateral to other rights asserted. These claims are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Mitchell v. Forsyth, ____ U.S. ____, 105 S. Ct. 2806, 2815 (1985); quoting Cohen, 337 U.S. at 546.

There were other issues which the petitioner may have challenged after the operating license for Perry was issued. The difference between "other issues" and the issue herein, is that the Licensing Board, the Appeal Board and the Commission made decisions based on a full and complete record which was developed before the agency in deter-

mining the "other issues." Further, the petitioner as an intervenor in the proceedings before the agency, was given the opportunity to, and did in fact participate in the proceedings as to the "other issues." The petitioner contributed to the record and was given the chance to cross-examine the testimony and evidence of the NRC Staff and the Utility as provided by statute and regulation.

The instant matter is different. The petitioner was denied its right to participate in licensing proceedings on an issue of significant safety importance through the intrusion of the Commission. The petitioner was denied the opportunity to contribute to the record within the adjudicatory context. This important right is clearly collateral to and independent from any future court challenge to the proceedings which

were had before the agency. This right to participate will effectively be lost once the Perry Plant is operating at full-power.

This Court has granted certiorari when the courts of appeals have allegedly misconstrued, misapplied or misconceived applicable Supreme Court opinions. See McCandless v. Furlaud, 296 U.S. 140 (1935); Upshaw v. United States, 335 U.S. 410 (1948); Wilkinson v. United States, 365 U.S. 399, 401 (1961); Schlude v. Commissioner, 372 U.S. 128, 130 (1968). The Court has also granted certiorari where the decision below seemed to be out of line with the authorities or appeared to be in conflict with precedents. See Braen v. Pfeifer Transportation Co., 361 U.S. 129, 130 (1959); Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728, 733 (1982).

The decision below clearly did not apply the "collateral order" doctrine to the facts and circumstance of the instant matter. If Cohen and Forsyth had been applied in the appropriate manner, the court below would have been in the position to maintain jurisdiction over the Petition for Review and decide the merits of the petitioner's claim prior to the issuance of the full-power operating license for Perry.

## CONCLUSION

The Ohio Citizens for Responsible Energy has been an intervenor before the NRC in the licensing proceeding for Perry for over five years. The petitioner has consistently participated in the proceedings before the agency and followed the course as outlined by statute and regulation. The petitioner has contended throughout these

proceedings that the right to be heard on the unexpected significant earthquake before the full-power license is issued and the plant operates at full-power is based upon statute and regulation. The opportunity to participate in the adjudicatory proceedings before the licensee is allowed to operate at full-power is paramount.

The Order of the Commission which is the subject of the Petition For Review is a "final order" under the Administrative Orders Review Act and subject to review by the court of appeals. Further, the order contains "essential attributes of finality and attaches consequences and harm" to the petitioner. An order need not be the very last order in the agency proceedings to be considered a "final order" for purposes of judicial review. Finally, if the court below had applied

the "collateral order" doctrine, it would have been able to maintain jurisdiction and review the merits of the claim of the petitioner.

For these various reasons, the petition for certiorari should be granted.

Respectfully submitted,

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February 20, 1987

# APPENDIX

No. 86-3355

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC., | ) | |
| Petitioner, | ) | |
| v. | ) | ORDER |
| NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA, | ) | |
| Respondents. | ) | |

BEFORE: JONES, MILBURN and NELSON, Circuit Judges

This matter is before the Court upon consideration of petitioner's emergency motion to stay the September 5, 1986, Nuclear Regulatory Commission's meeting concerning the Perry Nuclear Power Plant. The Intervenor and Respondents have responded.

Upon consideration of the documents which were filed with this Court, it appears that petitioner has met the criteria for granting a stay. Tate v. Frey, 735 F.2d 986 (6th Cir. 1984). The gravity of the issues raised herein is such as to prompt this Court to resolve its doubts in favor of granting a delay.

It is ORDERED that the motion for stay be denied as to the September 5, 1986, meeting of the Nuclear Regulatory Commission but granted as to any possible vote on the Perry Nuclear Power Plant. The case is directed to be expedited and the parties to brief, among other issues, the issue of jurisdiction of this Court.

Judge Nelson dissents from this order, believeing that a "possible vote" on the granting of a full-power operating license (51 Fed. Reg. 29043,

August 13, 1986) is neither a "decision or order" that this Court is empowered to stay under Rule 18, Federal Rules of Appellate Procedure, nor an "action" the effective date of which may be postponed under 5 U.S.C. § 705.

ENTERED BY ORDER OF THE COURT

Clerk

No. 86-3355

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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| | |
|---|---|
| OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC., *Petitioner,* v. NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA, *Respondents,* and CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al., *Intervenors.* | ON PETITION to Review an Order of the United States Nuclear Regulatory Commission. |

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Decided and Filed October 14, 1986

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Before: MARTIN, JONES and MILBURN, Circuit Judges.

MILBURN, Circuit Judge, delivered the opinion of the court, in which MARTIN, Circuit Judge, joined. JONES, Circuit Judge, (p. 7) delivered a separate dissenting opinion.

MILBURN, Circuit Judge. This matter is before the court on a request to reconsider the order entered by this court on

September 4, 1986, wherein we directed that any possible vote on the full-power operation of the Perry Nuclear Power Plant be stayed pending this hearing. By this opinion we dissolve our stay order and dismiss the petition for review filed by the Ohio Citizens for Responsible Energy, Inc., because we find that the order denying the petitioner's motion to reopen the proceedings before the Appeal Board of the Nuclear Regulatory Commission was not a final order.

## I.

Ohio Citizens for Responsible Energy, Inc. (OCRE) was permitted to proceed in the licensing procedure of the Perry Nuclear Power Plant as an intervenor. The plant was operating at 5 per cent power when on January 31, 1986, an earthquake of 5.0 magnitude occurred ten miles south of the plant. The plant was designed to withstand .15 g (a "g" is a measure of ground acceleration in relation to gravity during an earthquake). However, the January earthquake was estimated to have generated between .19 and .25 g.

Three days after the quake, OCRE filed a motion to reopen the record and submit a new contention to the Atomic Safety and Licensing Appeal Board in light of the earthquake. Newspaper articles were submitted in support of the motion to reopen. In response to the motion, the Nuclear Regulatory Commission (NRC) and the applicant presented extensive technical data refuting the contention that the earthquake was safety significant. The Appeal Board determined that OCRE presented "evidence of a significant safety matter" but that it was "difficult to make an informed judgment on the basis of preliminary written materials where, as here, the combined and complicated fields of geology, seismology, and engineering mechanics come into play." The Appeal Board decided to hold an exploratory hearing to aid in its determination of whether or not to reopen the Perry Power Plant hearing on the issue of seismic design.

On April 17, 1986, the Nuclear Regulatory Commission held a sua sponte meeting to address the decision of the

Appeal Board to hold an exploratory hearing. The Commission found that its "inherent supervisory authority over the conduct of NRC adjudications" gave it the authority to intervene in the matter. After considering the instant case in light of the standards established for reopening records, the Commission vacated the Board's order setting an exploratory hearing and denied the motion to reopen.

OCRE filed a petition to review the Commission's order in this court on April 23, 1986. On August 13, 1986, the Commission published notice in the Federal Register that a discussion and possible vote on the full-power operating license for the Perry Plant would be held on September 5, 1986. On August 27, 1986, OCRE was notified of the meeting and on the same date filed a motion for continuance of the hearing with the Commission. The Commission denied the motion on the afternoon of September 4.

An emergency motion for stay of agency proceedings was filed in this court on September 3, 1986. The respondents' and intervenors' responses to the motion for stay argued that this court lacked jurisdiction. This court on September 4, 1986, stayed any voting on the Perry license, but denied a stay of the September 5 meeting of the Commission and directed that the case be expedited for hearing on the jurisdictional issue.

On September 8, a motion for expedited reconsideration was filed by the respondent, and a motion for expedited briefing and argument was filed by the intervenors. Reconsideration was denied, and an expedited briefing schedule was set by this court by order entered September 10, 1986. On September 25, 1986, the parties appeared before this court to argue the jurisdictional issue.

## II.

This court has jurisdiction under 28 U.S.C. § 2342 to review "all *final* orders of the Atomic Energy Commission

made reviewable by section 2239 of title 42." (emphasis supplied). This court has never defined the term "final order"; however, in making this determination we are guided by well-reasoned precedent from other jurisdictions.

In *Thermal Ecology Must Be Preserved v. Atomic Energy Commission*, 433 F.2d 524 (D.C. Cir. 1970) (per curiam), the District of Columbia Circuit declined to consider an appeal from the NRC's order refusing to allow petitioners to offer certain evidence in the course of proceedings. The court held that " [a]n agency's procedural or evidentiary rulings in the course of a proceeding do not constitute a final order justifying judicial review. . . . [T]he availability of relief from the final order granting a certificate is sufficient to preclude the ruling denying admission of evidence from being considered a final order." *Id.* at 526. *See Ecology Action v. United States Atomic Energy Commission*, 492 F.2d 998 (2d Cir. 1974) (prehearing conference order excluding certain issues from consideration in construction proceedings was not a final order subject to judicial review).

We agree that interlocutory orders such as those considered in *Ecology Action* and *Thermal Ecology* should not be reviewed by this court. Although *Ecology Action* recognized that interlocutory review may be appropriate under certain circumstances, the exception "should be limited to cases where the [interlocutory] ruling is so flagrantly wrong and demonstrably critical as to make it apparent that the agency is not merely courting the possibility of reversal but is running into the certainty of it. . . ." 492 F.2d at 1001.

In the instant case, we cannot conclude that interlocutory review is appropriate. The Commission's determination that the standards for reopening have not been met is supported by its decision in *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 N.R.C. 1 (1986), *aff'd. Oystershell Alliance v. NRC*, _ F.2d _, No. 85-1182 (D.C. Cir. 1986) (per curiam). The only documentation supporting the petitioner's motion to reopen was a newspaper

article. Conversely, respondents presented extensive evidence in opposition to the motion. Accordingly, we hold that the refusal to reopen under these circumstances was not so "flagrantly wrong" as to justify judicial intervention at this stage of the proceedings.

We conclude that, in licensing proceedings before the NRC, a final order is the order granting or denying a license. *See Natural Resources Defense Council, Inc. v. NRC*, 680 F.2d 810 (D.C. Cir. 1982); *Citizens for a Safe Environment v. Atomic Energy Commission*, 489 F.2d 1018 (3d Cir. 1974). The District of Columbia Circuit's decision in *Oystershell Alliance v. NRC*, _ F.2d _, No. 85-1182 (D.C. Cir. September 9, 1986) (per curiam), strongly supports our conclusion. In *Oystershell Alliance*, petitioners argued that their motions to reopen the licensing proceedings should have been decided before the Commission authorized full-power operation. The court disagreed, concluding that the Commission's decision to license after examining all relevant evidence and determining that the plant could be operated safely, was "well within the Commission's discretion." Slip op. at 10.

The court also affirmed the Commission's decisions denying the motions to reopen. "Where as here the agency has taken final action on a matter that is peculiarly within its realm of expertise, we will not require the agency to reopen its proceedings except upon a clear showing of abuse of discretion or of extraordinary circumstances." *Id.* at 12 (quoting *Mobil Oil Corp. v. ICC*, 685 F.2d 624 (D.C. Cir. 1982). Implicit in the court's entire discussion is the notion that review of the final licensing decision is the appropriate proceeding in which to consider all objections.

We conclude that the analysis utilized in the decisions discussed above is the appropriate one for use in reviewing licensing decisions of the NRC. Because review of the final licensing decision may encompass all challenges raised in the proceeding, such review will be withheld until a final decision is issued.

## III.

The stay prohibiting a final vote on the full-power license is hereby dissolved, and the petition for review is dismissed.

JONES, Circuit Judge, Dissenting. I respectfully dissent from the majority's decision that this court lacks jurisdiction in this case. I believe that the order denying petitioner's motion to reopen the record is appealable under the "collateral order" doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Supreme Court has declared that an order is final for the purposes of appeal when it meets the following criteria: 1) the order must be effectively unreviewable unless it is reviewed immediately; 2) it must conclusively determine the disputed question; and 3) it must involve a claim of right separable from, and collateral to, rights asserted in the action. *Mitchell v. Forsyth*, 105 S.Ct. 2806 (1985).

The claim of right decided by the denial to reopen the record is the right of the citizens group to participate in an adjudicatory proceeding before the licensing of the nuclear plant. This right to participate is effectively lost once a license has been granted. This right is conclusively denied by the decision not to reopen the record. Most significantly, it is a claim of right separate from the merits of licensing the plant. Even if the plant is not licensed, petitioner's right to participate in the decisionmaking process will still have been infringed. Thus, it is incorrect to imply that the merits of the order are not "ripe" for adjudication until the license itself has been either granted or denied.

For these reasons I would find the order to be final and appealable.

No. 86-3355

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC., | ) | |
| Petitioner, | ) | |
| v. | ) | ORDER |
| NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA, | ) | |
| Respondents. | ) | |

BEFORE: MARTIN, JONES and MILBURN, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has

been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Thomas M. Roberts
James K. Asselstine
Frederick M. Bernthal
Lando W. Zech, Jr.

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | Docket Nos. |
| CLEVELAND ILLUMINATING ILLUMINATING COMPANY ET AL. | ) | 50-440 OL |
| | ) | 50-441 OL |
| (Perry Nuclear Power Plant, Units 1 and 2) | ) | |

MEMORANDUM AND ORDER

CLI-86-07

I.

For the reasons set forth below, the Commission has determined that the Atomic Safety and Licensing Appeal Board's actions in this proceeding warrant intervention in order to clarify a misinterpretation of Commission case

law and precedent. The Commission's inherent supervisory authority over the conduct of NRC adjudications gives it the authority to intervene.

On January 31, 1986, an earthquake occurred in northeastern Ohio. The earthquake measured 5.0 in magnitude and its epicenter was located approximately ten miles south of the Perry nuclear facility. Three days later, on February 3, intervenor Ohio Citizens for Responsible Energy (OCRE) filed a motion to reopen the record in the Perry operating license proceeding for the purpose of admitting a new contention challenging the adequacy of the facility's seismic design. The Applicants and Staff opposed the motion to reopen primarily on the ground that the earthquake and its effects did not present a significant safety question. The Appeal Board, unable to decide whether the

issue raised by the motion to reopen had true safety significance, decided to hold an exploratory hearing to aid it in its determination of safety significance. See Appeal Board Orders of March 20 and April 8, 1986 (unpublished).

II.

The standards for reopening a closed record require consideration of three factors: (1) whether the motion to reopen is timely; (2) whether the information raises a significant safety (or environmental) concern; and (3) the motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially. See, e.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 311 (1985).

The Board, in its analysis of the motion to reopen, found that the motion to reopen was timely. Order of March 20, 1986 at 4 n.7. However, the Board was not convinced that the motion had safety significance. If the Board, after considering the parties' submissions, was not convinced that the motion raised a matter of safety significance, it should have denied the motion to reopen.

In Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1 (1986), we addressed the issue of whether an Appeal Board has the authority to seek additional information before ruling on a motion to reopen. Our Waterford decision holds that a Board is to decide the motion to reopen on the information before it and has no authority to engage in discovery in order to supplement the pleadings before it. Simply put, the

burden of satisfying reopening requirements is on the movant, and Boards must base their decisions on what is before them. That the movant did not meet this burden in the view of the Appeal Board is evident from the Board's order of April 8, 1986, in which it states that it needs the exploratory hearing to aid its "determination respecting whether the new issue raised by the OCRE motion has true safety significance." (Emphasis added.) Accordingly, the Board had no authority to pursue this matter as it did.[1] See also Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-85-7, 21 NRC 1104, 1106 (1985).

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[1]Nor did the Appeal Board here have the authority sua sponte to seek to obtain information relevant to the motion to reopen. Boards have the authority to examine issues not placed in controversy by the parties only where [footnote continued, next page]

Additionally, we note that OCRE in its reply to the Staff and Applicant responses in opposition to its motion to reopen conceded "that the high frequency exceedances of the SSE design acceleration recorded in the January 31, 1986 earthquake do not have engineering significance." OCRE Reply to Staff and Applicant Responses to OCRE's Motion to Reopen the Record and to Submit a New Contention at 1. OCRE also concedes that the earthquake caused little or no damage to the plant. Id. Assuming arguendo, that the Appeal Board was correct in stating that the burden of going forward shifted to the Applicants

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[footnote continued]
specific facts are brought to their attention indicating that there is a serious safety, environmental, or common defense and security matter. See 10 C.F.R. § 2.760a; Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614, 615 (1981). The Appeal Board made no such finding here.

and Staff when OCRE called "attention to the apparent fact that the earthquake exceeded the design basis SSE in at least one respect," these concessions appear to negate any prima facie case of safety significance. See Order of March 20, 1986 at 4 n.7 and at 6.

The earthquake has already received a great deal of attention. The NRC staff has already completed one study (SSER No. 9) and some additional confirmatory work must be completed before the granting of a full-power license. Matters which need to be addressed before licensing can be handled by the Commission and its Staff outside of the adjudicatory context. See Cincinnati Gas and Electric Company. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-20, 16 NRC 109 (1982).

III.

The Appeal Board's orders setting up the exploratory hearings are VACATED. The petition to reopen is DENIED. The Staff, however, should be prepared to discuss the matters raised by the Board in its March 20, 1986 Order in its presentation before the Commission on the full-power license. The Applicants and the Intervenor will also be afforded an opportunity to make presentations to the Commission on these matters.

Chairman Palladino has additional remarks which are attached. Commissioner Asselstine disapproved this Order; his dissenting views are attached.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
this 18th day of April, 1986.

SEPARATE VIEWS OF CHAIRMAN PALLADINO

While I support the Waterford Doctrine referred to in the Commission's order, I would have sought clarification of the Appeal Board's reasons behind its March 20, 1986 order.

Notwithstanding the above, I find compelling the fact that Intervenor has abandoned the theory of their February 3, 1986 motion to reopen the record as described in the Commission's order. Thus, I support the Commission's order denying the motion to reopen.

## DISSENTING VIEWS OF COMMISSIONER ASSELSTINE

I do not agree with the Commission's action today. The Commission should not have interposed itself into the Appeal Board proceeding but should simply have permitted the Appeal Board to proceed as it outlined in its orders. At a minimum, the Commission should not have summarily vacated the Board's orders and summarily denied the motion to reopen without first hearing from the parties.

The action of the Appeal Board in this case is an eminently sensible solution to a difficult problem. The Board was told that, in at least one respect, the 1986 Ohio earthquake exceeded the SSE for the Perry plant.[1] The Applicants and NRC Staff asserted that, even though the earthquake did exceed the SSE, the event did not present a significant safety issue for operation of Perry. The Appeal Board felt, however, that it needed more information before it could make a final determination of safety significance.

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[1] In its Order (p. 236), the Commission seems to attach some significance to the fact that OCRE has conceded in its response to Staff and Applicant filings "that the high frequency exceedances of the SSE design acceleration recorded in the January 31, 1986 earthquake do not have engineering significance" and that the earthquake caused little or no damage to the plant. This is largely irrelevant to the question at issue here. The Intervenor has not abandoned its claim that the earthquake raises questions about the adequacy of the seismic [Footnote continued, next page]

The Board stated:

> Even with regard to so seemingly simple an issue as safety significance, it is difficult to make an informed judgment on the basis of preliminary written materials where, as here, the combined and complicated fields of geology, seismology and engineering mechanics come into play. In this connection, our examination of the documentary submissions of the Applicants and Staff have given rise to several questions that, in our view, require further exploration before we can decide with any degree of confidence whether a reopening of the record is justified.

Appeal Board Order dated March 20, 1986, at 6.

Given these circumstances, the Appeal Board decided to hold a 1-day "mini hearing" to obtain answers to its questions in order to make a decision on whether the Ohio earthquake presents a significant safety issue. Thus, the Board established a procedure by which

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[footnote continued]
design basis for the plant and of compliance with NRC regulations. These are the very subjects on which the Appeal Board wished to obtain additional information from the Applicants and Staff..

it could ensure an adequate examination of the issue of safety significance without all of the trappings of a full-blown hearing. Rather than reining in the Appeal Board, the Commission should be encouraging the Board in its efforts to consider all the evidence carefully and to have a more complete record before deciding upon a motion to reopen.

Unfortunately, the Commission feels compelled to apply its decision in Waterford to this case. Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1 (1986). I disagreed with that decision as well, and for good reason. That decision denies Board members the opportunity to obtain answers to questions raised as a resu of the parties' filings on a motion to reopen. The Waterford decision, when combined with

the Commission's standards for reopening and the Commission's rules on raising issues sua sponte, ties the hands of the Boards. By setting such high standards in all of these areas, the Commission has made it extremely difficult for an intervenor to raise new issues.

In addition, the Commission has now made it virtually impossible for the Boards to obtain additional information, which is not in the parties' initial filings, in order to satisfy themselves that an issue does or does not present a significant safety issue. Thus, in the future, whether a Board can consider a safety issue in some detail before ruling on a motion to reopen will depend upon how adept a particular intervenor is in meeting these stringent pleading requirements on the first round of pleadings. If the intervenor does not make an open and shut case in his

initial pleading, he will not get a second chance. Further, the Board will not be permitted to ask for additional information no matter how many questions the Board has, unless the Board grants the motion to reopen. This could have either of two results, neither of which is particularly beneficial. Either the Boards will read the Waterford and Perry orders strictly and will not grant a motion to reopen without a seemingly irrefutable pleading from the intervenor, in which case fewer issues will be resolved with input from the public. Or, rather than treat the issue superficially, the Boards will be more inclined to grant a motion to reopen if they have unanswered questions and thus begin a full-blown hearing. The action of the Appeal Board here seems to be a sensible compromise to avoid either extreme.

The Commission's devotion to technical pleading requirements with regard to motions to reopen is certainly understandable because proceedings must come to an end sometime. Such devotion to the Commission's rules and precedents might even be admirable, if it were applied uniformly to all parties. However, when I contrast this case with the Commission's recent orders in the Braidwood proceeding, it is apparent that the Commission does not require the same level of performance from all parties. (See, Commonwealth Edison Company (Braidwood Station, Units 1 and 2), Docket Nos. 50-456 and 457, Commission Orders dated December 5, 1985, and March 20, 1986 (both unpublished). In that case the Commission went out of its way to give the applicant a second chance to make

its case on a motion on which it clearly had not met its burden as movant.

Aside from all of the above, however, the Commission's decision today suffers from an additional infirmity. At a minimum, the Commission should in this case have heard from the parties before deciding whether to issue this order. The Commission should not have interposed itself into the Perry proceeding, without being asked by any party, and then summarily disposed of both the Appeal Board "mini-hearing" and the intervenor's motion to reopen. Allowing the parties an opportunity to speak for a few minutes on this issue at the Commission meeting, during which the Commission usually decides whether to issue a full-power license, is hardly an adequate substitute for a close look at this issue by the Appeal Board.

28 U.S.C. § 2342

Jurisdiction of court of appeals

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42; and

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

## 42 U.S.C. § 2239

### Hearings and judicial review

(a) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal

Register, on each application under section 2133 or 2134(b) of this title construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty day's notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a

determination by the Commission that the amendment involves no significant hazards consideration.

Supreme Court, U.S.
FILED
MAR 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1390

# In the Supreme Court of the United States

OCTOBER TERM, 1986

OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC., PETITIONER

*v.*

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether a Nuclear Regulatory Commission order refusing to allow a party to reopen the administrative record to introduce new evidence in a pending licensing proceeding is a "final order" reviewable in the court of appeals under 28 U.S.C. 2342(4) and 42 U.S.C. 2239(b).

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# In the Supreme Court of the United States

OCTOBER TERM, 1986

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*v.*

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A9) is reported at 803 F.2d 258. An earlier order of the court of appeals (Pet. App. A1-A3) is unreported. The memorandum and order of the Nuclear Regulatory Commission (Pet. App. B1-B17) is reported at 23 N.R.C. 233. The memorandums and orders of the Atomic Safety Licensing and Appeal Board are unreported.[1]

## JURISDICTION

The judgment of the court of appeals was entered on October 14, 1986. A petition for rehearing was denied on November 25, 1986 (Pet. App. A11-A12). The petition for a writ of certiorari was filed on February 21, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The memorandums and orders of the Atomic Safety Licensing and Appeal Board are not reprinted in the appendix to the petition. We have lodged copies with the Clerk of the Court.

## STATEMENT

1. a. In 1980, respondent Cleveland Electric Illuminating Company (CEI) and other public utilities applied to the Nuclear Regulatory Commission (NRC or Commission) for a license to operate the Perry Nuclear Power Plant, a two-unit facility located on the shore of Lake Erie in northeastern Ohio.[2] The following year, the NRC began hearings on whether to issue an operating license for the plant, and petitioner was permitted to intervene in the proceedings as a party. The hearings were conducted by the Atomic Safety and Licensing Board (Licensing Board), which issued partial initial decisions in favor of plant operation on December 2, 1983 (18 N.R.C. 1365), and on September 3, 1985 (22 N.R.C. 514). Petitioner appealed the Licensing Board's decision to the Atomic Safety and Licensing Appeal Board (Appeal Board).

On January 31, 1986, while petitioner's appeal was pending before the Appeal Board, an earthquake of magnitude 5.0 occurred approximately ten miles south of the Perry plant.[3] Three days later, petitioner filed with the Appeal Board a motion to reopen the administrative record, seeking leave to raise a new claim challenging the adequacy of the plant's seismic design (Pet. App. B2). Attached to the motion was a newspaper article about the earthquake (*id.* at A5), but the motion was devoid of any technical basis for believing the plant's design to be inadequate. The Commission staff and the applicants opposed the motion to reopen the record. In its reply pleading filed

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[2] The applicants for the license were CEI, Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company, and the Toledo Edison Company. These applicants were intervenors in the court of appeals and are respondents in this Court.

[3] The plant was constructed to shut down safely in the event of an earthquake of magnitude 5.3 (App., *infra*, 3a).

with the Appeal Board, petitioner conceded that, to the extent that the earthquake caused high frequency vibrations exceeding those expected from a "Safe Shutdown Earthquake," those "high frequency exceedances * * * do not have engineering significance" (*id.* at B6). Petitioner further conceded that the earthquake had caused little or no damage to the Perry plant (*ibid.*). The Appeal Board concluded that it was unable to decide whether the motion to reopen should be granted, and, by an unpublished order dated March 20, 1986, the Appeal Board scheduled an exploratory hearing to consider the matter further (*id.* at B2-B3).

b. On April 18, 1986, the Commission, acting sua sponte, vacated the Appeal Board's March 20 order and denied petitioner's motion to reopen the administrative record, on the ground that the Appeal Board's decision was contrary to established NRC precedent (Pet. App. B1, B8). The Commission ruled that the Appeal Board should have denied petitioner's motion, rather than schedule a hearing, if the Board found itself unable to conclude, on the basis of the papers before it, that petitioner had raised a safety question of sufficient significance to warrant reopening the record (*id.* at B4-B5).[4] The Commission instructed its staff, however, to be prepared to discuss the matters raised in the Appeal Board's March 20 order as part of the staff's upcoming presentation to the Commission on the question whether to issue a full-power operating license for the Perry facility (*id.* at B8).

2. On April 23, petitioner filed a petition for review of the Commission's April 18 order in the court of appeals. On September 4, 1986, one day before the Commission

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[4] Commissioner Asselstine, the sole dissenter, believed that the Appeal Board correctly decided to hold a brief exploratory hearing before ruling on the motion (Pet. App. B10-B17). He did not express any opinion, however, whether the record should have been reopened.

was scheduled to discuss and possibly to vote on the question whether to issue a full-power operating license for the Perry plant, the court of appeals, at petitioner's request and by a divided vote, issued a stay barring the Commission from taking "any possible vote" on the Perry license (Pet. App. A2).[5] On October 14, the court, over one dissent, dissolved the stay and dismissed the petition for review, on the ground that the Commission's order denying petitioner's motion to reopen the record was not a "final order" reviewable in the court of appeals under 28 U.S.C. 2342(4) and 42 U.S.C. 2239 (Pet. App. A7-A8).[6] The court concluded that judicial review should be postponed until the Commission granted or denied the license application, since all challenges raised during the course of an NRC proceeding can be resolved at that time (*id.* at A8).[7]

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[5] Judge Nelson dissented on the ground that the court lacked authority to stay a Commission vote on a full-power operating license application (Pet. App. A2-A3).

[6] Judge Jones dissented on the ground that the Commission's order refusing to reopen the record was an appealable collateral order (Pet. App. A10).

[7] On October 23, petitioner sought rehearing en banc in the court of appeals, and on October 27 petitioner again sought a stay from that court, asserting that the Commission could not issue an operating license for the Perry plant, because the court of appeals had not yet issued the mandate from its October 14 decision. The court of appeals denied the stay request on November 7 and denied rehearing on November 25. On January 5, 1987, petitioner applied to Justice Scalia for a stay of the mandate of the court of appeals pending the filing of a petition for a writ of certiorari. Justice Scalia denied the application on January 8. *Ohio Citizens for Responsible Energy* v. *NRC*, No. A-499.

Other proceedings have been ongoing in the meantime. On September 5, 1986, the State of Ohio sought leave from the Commission to intervene as a party to the Perry licensing proceedings. The Commission denied the state's request on October 30, and Ohio filed a petition for review of the Commission's decision in the court of ap-

## ARGUMENT

The decision of the court of appeals is correct, it does not conflict with any decision of this Court or of any other court of appeals, and it presents no significant legal question. Accordingly, review by this Court is not warranted.

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peals (*Ohio ex rel. Celebrezze* v. *NRC*, No. 86-4019). On November 7, at the state's request, the court of appeals issued a stay barring the Commission from issuing a full-power license for the Perry plant. The court of appeals lifted the stay on November 11 and authorized the Commission to issue a license for the Perry plant. The license was issued two days later, November 13. On the same day, the court of appeals in the *Ohio* proceeding issued a new stay barring the licensee from using the license for full-power operation. The court of appeals eventually set the stay aside on December 23. Petitioner applied to Justice Scalia for a stay of the court of appeals' December 23 order, and the application was denied on December 31. *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, No. A-480.

In the interim, Ohio commenced another proceeding in the court of appeals seeking review of the Commission's decision to issue an operating license for the Perry plant (*Ohio ex rel. Celebrezze* v. *NRC*, No. 86-4038). The petitioner in this case did the same (*Ohio Citizens For Responsible Energy, Inc.* v. *NRC*, No. 86-4037). The court of appeals consolidated all three petitions (*i.e.*, Ohio's petition seeking review of the Commission's order denying it party status (No. 86-4019), and the petitions filed by the petitioner in this case and Ohio seeking review of the Commission's decision to grant a full-power operating license for the Perry plant (Nos. 86-4037 and 86-4038)), and heard argument on December 3, 1986. On December 23, the court of appeals, in the same consolidated proceeding, lifted the stay barring full-power operation at the Perry plant.

Finally, on March 17, 1987, the court rendered a decision on the three consolidated petitions. The court upheld the Commission's refusal to permit Ohio to intervene in the Perry licensing proceeding, as well as the Commission's decision to issue a full-power operating license for the Perry plant. For the convenience of the Court, the court of appeals' March 17 decision is reprinted in an appendix to this brief. App., *infra*, 1a-14a. The correctness of that decision, however, is not before the Court in this case.

The Hobbs Act provides the courts of appeals with exclusive jurisdiction to review "all final orders of the [Nuclear Regulatory Commission] made reviewable by" Section 189 of the Atomic Energy Act of 1954, 42 U.S.C. 2239 (28 U.S.C. 2342(4)), and the latter statute authorizes judicial review of a "final order" entered by the Commission in a proceeding "for the granting * * * of any license" (42 U.S.C. 2239(b)). It is well settled that the "final order" in a licensing proceeding is an order granting or denying a license. *NRDC* v. *NRC*, 680 F.2d 810, 815 (D.C. Cir. 1982); *Citizens for a Safe Environment* v. *AEC*, 489 F.2d 1018, 1021 (3d Cir. 1974); *Thermal Ecology Must Be Preserved* v. *AEC*, 433 F.2d 524, 525 (D.C. Cir. 1970); see *Ecology Action* v. *AEC*, 492 F.2d 998, 1001 (2d Cir. 1974); cf. *Stringfellow* v. *Concerned Neighbors in Action*, No. 85-184 (Mar. 9, 1987), slip op. 4 (quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945)) (a final judgment under 28 U.S.C. 1291 "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment"). The Commission's April 18, 1986, order in this case, which simply denied petitioner's motion to reopen the administrative record in a pending licensing proceeding, is plainly not a "final order" under the above decisions.

Nor does that order constitute an immediately appealable collateral order. To qualify as a collateral order, a decision must conclusively determine a disputed question, it must resolve an important question completely separate from the merits of the case, and it must be effectively unreviewable on appeal from a final judgment. *E.g.*, *Stringfellow*, slip op. 4; *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). Because petitioner can raise its claim on appeal from the order entered by the Commission issuing a license, the Commission's April 18 order does not satisfy the third requirement noted above and is not immediately reviewable in the court of appeals. *Stringfellow*,

slip op. 5-6 (district court order placing restrictions on an intervenor's participation in the case is not an appealable collateral order); see *Ecology Action*, 492 F.2d at 1001 ("an order excluding evidence would normally be the archetype of a non-final order, since any error would be inconsequential if the proponent prevails and can be corrected on review of the final order if he loses"); *Thermal Ecology*, 433 F.2d at 525-526 (NRC order denying an intervenor the opportunity to introduce certain evidence at a licensing hearing is not final).[8]

Petitioner's underlying argument is that its safety claims are significant and that the NRC improperly refused to consider them in the Perry licensing proceeding. But that issue was not before the court of appeals in this case. The court of appeals addressed that subject in its March 17, 1987, decision, in which the court upheld the Commission's refusal to reopen the administrative record to consider petitioner's claims.[9] Petitioner cannot obtain review of that decision in this case, however, and its challenge to the correctness of the NRC's April 18, 1986, order is not properly before the Court at this time.

---

[8] Petitioner errs in asserting (Pet. 16-17) that the decision below conflicts with *Westinghouse Elec. Corp.* v. *NRC*, 598 F.2d 759 (3d Cir. 1979). In that case, the Commission issued an order suspending its work on a generic environmental impact statement regarding the reprocessing of spent nuclear fuel, as well as its consideration of pending applications to construct reprocessing plants. Six months later, the Commission issued a statement giving its reasons for the first order. The court of appeals expressly declined to decide which order was "final" under 28 U.S.C. 2342(4) and 42 U.S.C. 2239(b), since every party had filed a timely petition for review from each order. 598 F.2d at 766, 768.

[9] In that decision, the court of appeals observed that the only evidence petitioner offered to support its concern with seismic activity was a newspaper article (App., *infra*, 6a). The court of appeals continued (*id.* at 6a-7a):

> Even if the NRC had permitted [the Appeal Board] to proceed with its exploratory hearing, [petitioner] planned to offer no in-

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1987

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formation or analysis of its own, but intended instead to conduct a cross-examination of witnesses presented by [the license applicant] and the NRC staff. Furthermore, [petitioner] had conceded that the January [1986] earthquake did little or no damage to the plant and that "the high frequency exceedances of the SSE [Safe Shutdown Earthquake] design acceleration recorded in the January 31, 1986 earthquake do not have engineering significance." Instead, [petitioner] sought to introduce a new theory based on the improbable contention that a discoverable "capable fault" (as defined in 10 C.F.R. Part 1, App. A, III(g)) caused the earthquake, even though such faults have rarely been identified east of the Rocky Mountains, and that the NRC staff had accordingly applied the wrong standards in making its seismic calculations.

The court of appeals concluded that petitioner's submissions comprised merely "the barest of allegations that the * * * earthquake has undermined the technical premises of the plant's structural design," and that these allegations were "palpably lacking in proof" (*id.* at 7a).

**APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

Nos. 86-4019, 86-4038 & 86-4037

STATE OF OHIO (86-4019 & 86-4038) AND OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC. (86-4037), PETITIONERS

*v.*

NUCLEAR REGULATORY COMMISSION, AND UNITED STATES OF AMERICA, RESPONDENTS

CLEVELAND ELECTRIC ILLUMINATING COMPANY, DUQUESNE LIGHT COMPANY, OHIO EDISON COMPANY, PENNSYLVANIA POWER COMPANY, AND TOLEDO EDISON COMPANY, INTERVENORS

---

Decided and Filed March 17, 1987

---

**Petition to Review Orders of the Nuclear Regulatory Commission**

Before: ENGEL, JONES, and RYAN, Circuit Judges.

RYAN, Circuit Judge, delivered the opinion of the court, in which ENGEL, Circuit Judge, joined. JONES, Circuit Judge, (pp. 13-14) delivered a separate concurring opinion.

RYAN, Circuit Judge. Petitioners seek to overturn three orders of the Nuclear Regulatory Commission (the NRC):

1. Petitioner State of Ohio appeals an order of the NRC denying leave to intervene in licensing proceedings pertaining to the Perry Nuclear Power Plant (the plant);

2. Petitioner Ohio Citizens for Responsible Energy, Inc. (OCRE) appeals an order of the NRC denying its motion to reopen the record in the plant licensing proceedings; and

3. Both petitioners appeal the NRC's order authorizing the plant's full-power operating license.

The issue is whether the NRC reasonably exercised its discretion in making these determinations. We hold that it did, and affirm all three orders.

I.

In 1980, intervenor Cleveland Electric Illuminating Company (CEI) and other public utilities applied to the NRC for a license to operate the Perry Nuclear Power Plant on the shore of Lake Erie in Northern Ohio. The NRC granted party status to OCRE and other interested parties in 1981. The State of Ohio did not seek to participate at that time.

Hearings were held pursuant to the Atomic Energy Act, 42 U.S.C. § 2239(a) (1973), in 1983 and 1985. No party to the proceedings raised the issue of the plant's capacity to withstand earthquakes. The adequacy of emergency planning was challenged by Sunflower Alliance, an intervenor in the proceedings, and was ultimately approved by the NRC. The record was closed on May 3, 1985.

On January 31, 1986, an earthquake of magnitude 5.0 on the Richter scale occurred approximately ten miles away from the plant. On February 3, 1986, OCRE filed a motion to reopen the record to consider the capacity of the plant's structures to resist seismic activity of this magnitude. In support of its motion. OCRE submitted a newspaper article reporting that vibratory ground motion at the plant during the earthquake had exceeded the peak acceleration for which the plant had been designed.

The NRC staff studied the available data and determined that, while the earthquake was severe and was different in some respects from the archetype of earthquake motion used in designing the plant structures, the high frequency energy levels that had exceeded the "design spectrum" for ground motion did not raise a serious safety concern. The plant had been designed to withstand earthquakes with magnitudes of 5.3 ± 0.5 because the most severe earthquake in the pertinent geographical zone, the 1937 Anna, Ohio, earthquake had an estimated magnitude of 5.0-5.3.

The appeal panel to which OCRE's contentions were submitted, recognizing the highly technical nature of the issue, scheduled an exploratory hearing in order to fully consider OCRE's claims. The NRC, however, determined that such a hearing was not appropriate and, because OCRE had failed to support its motion with evidence sufficient to merit reopening the record, ordered that the motion be denied. OCRE has appealed this denial.

The January, 1986, earthquake also stimulated new concerns on the part of the Governor of Ohio. These concerns were heightened by the April, 1986, nuclear accident at Chernobyl, in the Soviet Union, and eventually focused upon the adequacy of the emergency preparedness plans for Ohio's commercial nuclear reactors. On August 15, 1986, the Governor appointed a cabinet-level task force to review the adequacy of the evacuation plan which had previously been prepared by Ohio authorities with a view to the eventual full-power operation of the plant. On the same day, the Governor informed the NRC that he was withdrawing his support for the plan. He requested that the NRC delay its vote on full-power licensing until after the task force report was complete. The task force was given a due date of December 31, 1986. We have not been advised at this writing whether the report has been completed or, if completed, released.

While maintaining informal communications with the NRC about its concerns and the progress of the task force's investigation. Ohio also sought formal intervention in the proceedings on September 5, 1986, as an "interested state" under 10 C.F.R. § 2.715 (1986). On October 29, Ohio submitted preliminary findings of the task force to the NRC, requesting that full-power licensing be delayed until the report was completed and the emergency plan could be revised accordingly. On October 30, the NRC denied Ohio's motion to intervene. Ohio has appealed this denial.

Meanwhile, the NRC's final vote on the plant's full-power license, originally scheduled for September 4, was stayed by this court at the instance of OCRE, which contended that it had a right to appeal the denial of its motion to reopen the record prior to that vote. On October 14, this court rejected OCRE's petition for review on the ground that the denial was not a final agency order. *Ohio Citizens for Responsible Engergy, Inc. v. NRC,* No. 86-3355, slip op. (6th Cir. Oct. 14, 1986). Accordingly, the stay was lifted.

On November 7, as the NRC prepared to conduct the vote on full-power licensing, Ohio petitioned this court to review the NRC's denial of Ohio's motion to intervene and also sought an emergency stay of the vote pending review. The vote proceeded, and the license was granted. Ohio and OCRE both sought review in this court of the NRC's final order granting the full-power operating license.

Although the license was issued on November 13, 1986, this court immediately ordered that implementation of full-power operation be stayed pending our review of these appeals. The plant thus continued operating at 5% capacity, as it had before the license was issued, rather than beginning the gradual escalation to 100% capacity authorized by the license.

On November 14, we consolidated and expedited the appeals of Ohio and OCRE. Oral argument was heard on December 3. On December 12, 1986, the five intervenor utilities moved the court to lift the stay, claiming that the "costs of delaying plant operations are accumulating at approximately $2.2 million per day or more than $40 million to date." The motion was opposed by the State of Ohio. We lifted the stay on December 23, 1986, Judge Jones dissenting. An application to the United States Supreme Court by OCRE to stay the mandate of our order lifting the stay was denied on December 31, 1986, in an opinion of Justice Scalia.

II

OCRE contends that the NRC's refusal to reopen the record in response to its request following the January, 1986, earthquake illustrates two chronic bureaucratic evils: first, the agency's inclination to shut the public out of the decision-making process, confident in the sufficiency of its own knowledge and expertise; and second, the agency's impatience with the pace of the democratic decision-making process imposed upon it by statute, which inclines the NRC to dispense with any procedure, however well-founded, that threatens delay.

In this case, these contentions are without merit. The agency proceedings in this case do not suggest an intolerance for public participation on the part of the NRC. The statutory scheme requires hearings to be held only upon those issues interested parties raise before the NRC in a timely manner. In the absence of a request, no hearings need be held at all. 42 U.S.C. § 2239(a)(1). Safety concerns not raised in public hearings must nonetheless be addressed by the NRC staff.

In this case, seismic considerations were not raised by OCRE or any other participant in the public licensing hearings. Accordingly, the NRC staff addressed this issue

on its own in accordance with the NRC's Seismic and Geologic Siting Criteria for Nuclear Power Plants, 10 C.F.R. Part 1, App. A. Thus, the NRC's reluctance to reopen the record on this issue does not imply either a high-handed disdain for public comment or a lack of concern for the seriousness of the issue. Rather, it indicates only that the public comment period was closed, and that the NRC had not been convinced that OCRE had a significant contribution to make to further staff analysis.

True, new data, in the form of an unexpected earthquake, had appeared since the closing of the record. However, in the absence of some showing that OCRE could assist materially in the analysis of that new data, there is no reason why that event, of itself, would require the record to be reopened. One of the purposes of the NRC's discretionary option to refuse reopening the record is to assure that the party who would reopen the record offers such material assistance rather than a mere continuation or rehash of the process ostensibly terminated when the record was closed initially.

"Under Commission practice, reopening is required when *new evidence* is shown to be *timely, safety significant,* and sufficiently *material* to have changed the result initially taken." *San Luis Obispo Mothers for Peace v. NRC,* 751 F.2d 1287, 1318 (D.C. Cir. 1984) (emphasis in original), *aff'd,* 789 F.2d 26 (D.C. Cir. 1986) (en banc). Here, OCRE's motion was conceded to be timely, but the NRC held the OCRE had not shown safety significance.

At the time of its motion, OCRE submitted only a newspaper article in support of its claims. Even if the NRC had permitted the appeal panel to proceed with its exploratory hearing, OCRE planned to offer no information or analysis of its own, but intended instead to conduct a cross-examination of witnesses presented by CEI and the NRC staff. Furthermore, OCRE had conceded that the January earthquake did little or no damage to the plant

and "that the high frequency exceedances of the SSE [Safe Shutdown Earthquake] design acceleration recorded in the January 31, 1986 earthquake do not have engineering significance." Instead, OCRE sought to introduce a new theory, based on the improbable contention that a discoverable "capable fault" (as defined in 10 C.F.R. Part 1, App. A, III(g)) caused the earthquake, even though such faults have rarely been identified east of the Rocky Mountains, and that the NRC staff had accordingly applied the wrong standards in making its seismic calculations.

In the face of this claim, palpably lacking in proof, the NRC staff opposed an extensive study purporting to answer OCRE's contentions in an exhaustive and technical manner.

Although we recognize the possibility that the pace of events and the implications of new information and developments may at times outstrip the relatively fixed agenda of an entrenched bureaucracy, and while we would not equate the absence of hard data in a case such as this with the absence of a threat to public safety, the fact remains that OCRE has made no showing that it has anything to contribute to the analysis of the plant's seismic security and only the barest of allegations that the January, 1986, earthquake has undermined the technical premises of the plant's structural design. Despite the appeal panel's willingness to give OCRE an opportunity to flesh out these allegations, we do not consider the NRC's decision to dispense with that opportunity necessarily to indicate unseemly haste.

*Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.,* 462 U.S. 87 (1983), involved a challenge to the NCR's approach to evaluating the environmental impact of the storage of certain nuclear wastes. In this context, the Court observed that

> "a reviewing court must remember that the Commission is making predictions, within its area of special

> expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."

*Id.* at 103. Arguably, somewhat less deference is appropriate here, but the fact remains that our role in reviewing NRC denials of requests to reopen the record is quite limited:

> "Where as here the agency has taken final action on a matter that is peculiarily within its realm of expertise, we will not require the agency to reopen its proceedings except upon a clear showing of abuse of discretion or of extraordinary circumstances."

*Mobil Oil Corp. v. ICC,* 685 F.2d 624, 632 (D.C. Cir. 1982).

A failure of the NRC to follow its own guidelines would constitute an abuse of discretion, *see San Luis Obispo Mothers for Peace v. NRC,* 751 F.2d 1287, 1318 (D.C. Cir. 1984), *aff'd,* 789 F.2d 26 (D.C. Cir. 1986) (en banc), but the NRC's action here was expressly premised upon a well-founded conclusion that OCRE had failed to show that new data resulting from the January, 1986, earthquake were safety significant. Evidently, OCRE was surprised by the NRC's procedure of interjecting itself into the reopening petition process and cancelling the exploratory hearing scheduled by the appeals panel. However, so long as the decision to reopen is committed to the NRC's discretion, no intervenor can claim an entitlement to an exploratory hearing the NRC reasonably deems to be unnecessary.

## III

NRC regulations delegate responsibility for developing off-site emergency plans to state and local governments. 10 C.F.R. § 50.47. These regulations provide in part:

> "(a)(1) Except as provided in paragraph (d) of this section, no operating license for a nuclear power re-

actor will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

"(2) The NRC will base its finding on a review of the Federal Emergency Management Agency [FEMA] findings and determinations as to whether State and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented, and on the NRC assessment as to whether the applicant's onsite emergency plans are adequate and whether there is reasonable assurance that they can be implemented."

The emergency plan for the Perry plant was developed by the State of Ohio, which now contends that the plan is seriously inadequate.

Ohio seeks to intervene in the plant's licensing proceedings, citing 10 C.F.R. § 2.715(c), which provides in part:

> "The presiding officer will afford representatives of an interested State, county, municipality, and/or agencies thereof, a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission without requiring the representative to take a position with respect to the issue."

This regulation preserves the right of a state to participate in licensing hearings, but does not address the state's rights once the hearings have been completed and the record closed. Thus, the state's belated request to intervene must be considered by this court in light of the limited "abuse of discretion" standard of review otherwise applicable to requests to reopen the record, as set forth above.

Ohio contends, however, that the NRC has abused its discretion in denying it leave to intervene. Ohio claims it is not an opponent of nuclear power, and has no intention of

holding up plant operations indefinitely. On the contrary, Ohio asked only for a delay in full-power operation until the end of 1986 so that the emergency plan could be fully studied and revisions could be undertaken. Ohio's request was not unreasonable. This court takes judicial notice of the fact that the stays we have imposed have come very close to rendering this issue moot despite our best efforts to resolve this matter expeditiously.

We recognize also that Ohio's responsibility for the safety of its inhabitants is unquestionably deserving of this court's consideration. In view of this responsibility, the untimeliness of Ohio's action and it failure to participate in the earlier public hearings would be entirely insufficient as grounds for NRC action dispensing with Ohio's concerns. The NRC, however, has neither ignored Ohio's contentions nor acted unreasonably in denying leave to intervene.

First, we note that Ohio's responsibility is entirely with *off-site* emergency preparations. These preparations may proceed apace regardless of the operational status of the plant.

Second, while the regulatory scheme was clearly designed to prevent full-power licensing until the NRC finds that there is "reasonable assurance" that the emergency plan is adequate, the NRC has in fact made a finding to this effect. Many of Ohio's more specific concerns were raised in the public hearings by intervenor Sunflower Alliance. Ohio's newfound misgivings are troubling, but do not necessarily undercut the reliability of the NRC's finding.

Finally, issuance of a license does not preclude Ohio from proceeding with research, oversight, and revisions in any portions of the emergency plan perceived as inadequate. Furthermore, 10 C.F.R. § 2.206 gives any person the right to institute a proceeding to "modify, suspend or revoke a license." While we recognize that it may be more difficult to shut a plant down than to prevent initial licens-

ing, the procedure provided for by § 2.206 appears to provide an adequate remedy for any grave safety shortcomings Ohio may henceforth discover and document.

These considerations persuade us that the NRC acted reasonably in denying Ohio's request to intervene in the full-power licensing proceedings.

## IV

Aside from the allegations contained in OCRE's petition to reopen the record and Ohio's petition for leave to intervene, we are presented with no basis upon which the NRC's decision granting the full-power operating license should be reversed. Accordingly, petitioners' objections to this decision must also be rejected.

## V

Our treatment of the issues raised on this appeal is conditioned by the very limited role Congress has assigned to the courts in the statutory scheme regulating the construction and operation of commercial nuclear power plants. As the Supreme Court has observed:

> "We are acutely aware that the extent to which this Nation should rely on nuclear power as a source of energy is an important and sensitive issue. Much of the debate focuses on whether development of nuclear generation facilities should proceed in the face of uncertainties about their long-term effects on the environment. Resolution of these fundamental policy questions lies, however, with Congress and the agencies to which Congress has delegated authority, as well as with state legislatures and, ultimately, the populace as a whole. Congress has assigned the courts only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes. As we emphasized

> in our earlier encounter with these very proceedings, '[a]dministrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute. . ., not simply because the court is unhappy with the result reached.' Vermont Yankee, 435 US, at 558, 55 L Ed 2d 460, 98 S Ct 1197 [1978]."

*Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983). The NRC acted within the confines of its statutory discretion in making the three decisions challenged by these appeals. This court is therefore required to uphold those decisions.

**VI**

The orders of the NRC appealed from are AFFIRMED.

JONES, Circuit Judge, concurring. The opinion of the court in this case sets out as good a basis for affirming the Nuclear Regulatory Commission's orders as can be done. Because I am persuaded that the scope of judicial review delineated by the Supreme Court in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983), and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), is extremely narrow, I concur in today's result. Nonetheless, I am sufficiently alarmed by the events that gave rise to the instant proceedings to write separately.

The court's opinion summarizes OCRE's description of the NRC's "bureaucratic evils" as:

> first, the agency's inclination to shut the public out of the decision-making process, confident in the sufficiency of its own knowledge and expertise; and second, the agency's impatience with the pace of the democratic decision-making process imposed upon it

> by statute, which inclines the NRC to dispense with any procedure, however well-founded, that threatens delay.

The majority of this panel finds no merit in such a description. However, if the proceedings in this case are any indication of the commission's standard practice, I think that the description is quite accurate. From my perspective, there is no better way to characterize the Commission's *sua sponte* order vacating the Appeal Panel's order scheduling an exploratory mini-hearing. The purpose of that mini-hearing was to determine whether the unexpected and uncharacteristically strong earthquake raised significant safety issues warranting a reopening of the record.

The Commission's treatment of the State of Ohio's concerns with the adequacy of the off-site emergency preparedness plan is even more disconcerting. The NRC's argument in support of its denial of the State's motion to intervene boils down to the following: While it is not too late for the State to make improvements in the existing off-site emergency plan that it fears may be seriously inadequate in certain respects, it is in fact too late for the State to guarantee the safety of its citizenry by temporarily delaying the issuance of Perry's full-power license pending the completion of its formal review. Granted, the Commission is not legally *required* to further stay the plant's full-power operation since it has satisfied itself that the existing off-site plan is adequate. However, that is not really the point. Where, as here, the State has expressed bona fide concerns for the safety of its people and has in good faith undertaken affirmative investigatory measures, it is at best patronizing for the Commission to turn a deaf ear to the State's plea for a brief delay. While the Nuclear Regulatory Commission may be secure in its belief that it is the ultimate protector of the Amercian people generally, and of the people of Ohio specifically, from the hazards of

nuclear power generation. I do not think that Congress ever intended for the Commission to have this type of one-sided relationship with a sovereign State over a serious matter of local health and safety.

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No. 86-1390

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC.,
*Petitioner,*

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,

and

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, *et al.*,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF RESPONDENTS THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, *ET AL.*, IN OPPOSITION TO CERTIORARI

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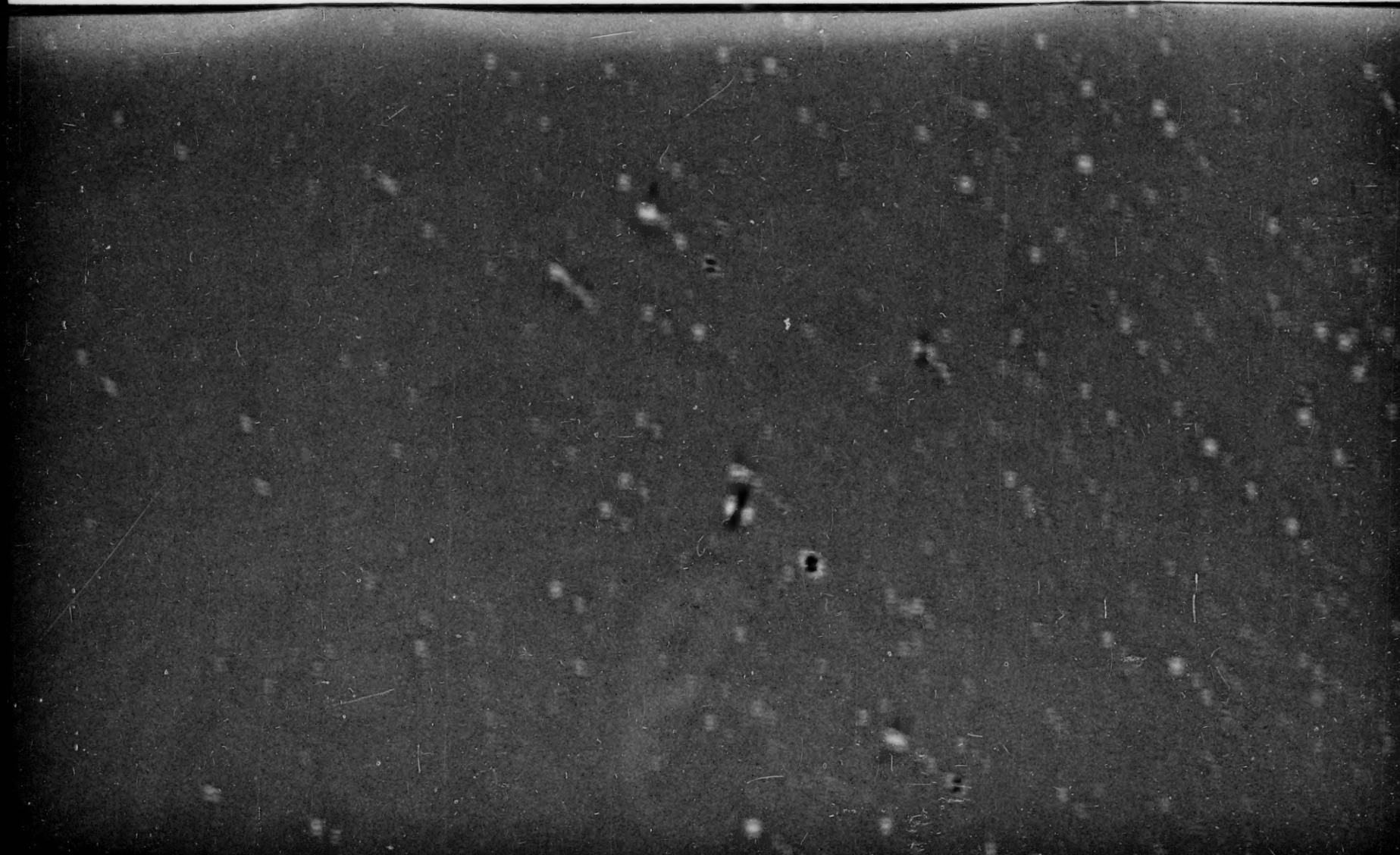

## QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit correctly decided that the Nuclear Regulatory Commission's denial of a motion to reopen the record was not a "final order" appealable to a federal court of appeals.

2. Whether a court of appeals decision that the Nuclear Regulatory Commission's denial of a motion to reopen the record was not a "final order" is rendered moot by that court's subsequent decision that denial of the motion to reopen was proper.*

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* Pursuant to Supreme Court Rule 28.1, Respondents state that The Cleveland Electric Illuminating Company and The Toledo Edison Company are wholly-owned subsidiaries of Centerior Energy Corporation and that Pennsylvania Power Company is a wholly-owned subsidiary of Ohio Edison Company.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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No. 86-1390

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OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC.,
*Petitioner,*

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,

and

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, *et al.*,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF RESPONDENTS THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, *ET AL.*, IN OPPOSITION TO CERTIORARI

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Respondents The Cleveland Electric Illuminating Company, Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company, and The Toledo Edison Company ("the Utilities") submit this brief in opposition to the petition for a writ of certiorari filed by petitioner Ohio Citizens for Responsible Energy, Inc. ("OCRE").

## STATEMENT OF THE CASE

This case involves the attempt by a party to a licensing proceeding before the Nuclear Regulatory Commission ("NRC") to judicially challenge an interlocutory order not to reopen an already completed administrative hearing record. In this case, the NRC declined to reopen the record in view of petitioner's unsubstantiated claims about the adequacy of the design of a nuclear power plant to withstand an earthquake. The United States Court of Appeals for the Sixth Circuit held that Congress' requirement that there be a "final order" before judicial review is available prohibited petitioner from prematurely seeking judicial review of this interlocutory order.

The Utilities are five electric utilities licensed by the NRC under the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011-2284 (1982) ("the Act"), to own and operate the Perry Nuclear Power Plant ("Perry").[1] Perry is a two-unit commercial nuclear power plant located on the shore of Lake Erie approximately 35 miles northeast of Cleveland. Perry Unit 1 is currently licensed to operate at full power.

In June 1973, the Utilities applied to the Atomic Energy Commission (the predecessor agency to the NRC) for authorization to build Perry. Following detailed technical reviews by the Commission Staff, including evaluation of the facility's seismic design, and lengthy public hearings, the NRC issued construction permits in May 1977. In June 1980, while construction was underway, the Utilities applied for operating licenses from the NRC. OCRE and several other organizations and individuals intervened in the NRC proceeding on the operating license application.

[1] The Utilities intervened in the court of appeals proceeding pursuant to 28 U.S.C. § 2348 (1982).

After extensive evidentiary hearings, the NRC's Atomic Safety and Licensing Board ("Licensing Board") resolved all contested matters in favor of the Utilities and authorized full-power operation of Perry. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-77, 18 N.R.C. 1365 (1983); LBP-85-35, 22 N.R.C. 514 (1985). OCRE's appeals to the NRC's Atomic Safety and Licensing Appeal Board ("Appeal Board") also were resolved in favor of the Utilities. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 N.R.C. 490 (1985); ALAB-841, 24 N.R.C. 64 (1986), *reconsideration denied*, ALAB-844, 24 N.R.C. 216 (1986). None of the contested issues challenged the seismic design of the Perry facility.[2]

On January 31, 1986, after final Licensing Board action and while OCRE's appeal was pending before the Appeal Board, an earthquake occurred in northeastern Ohio. The earthquake measured 5.0 in magnitude and its epicenter was located approximately ten miles south of the Perry facility. On February 3, 1986, OCRE filed with the Appeal Board a Motion to Reopen which sought to raise a contention challenging the seismic design of the Perry facility. This contention was based upon a newspaper article which cited acceleration forces allegedly in excess of the Perry design.

With the assistance of numerous experts, both the Utilities and the NRC Staff developed detailed studies of the significance of the earthquake. Relying on these technical analyses, the Utilities and the NRC Staff opposed the Motion to Reopen on the ground that the 1986 earthquake did not present a significant safety ques-

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[2] In addition to the trial-type procedures, and as part of its independent regulatory responsibilities at the operating license stage, the NRC Staff carried out and published extensive reviews of the entire plant design. These reviews included an analysis of the plant's seismic design.

tion.[3] This result is not surprising since the design of the Perry facility is based upon an earthquake of magnitude 5.3, about *twice* as energetic as the January 31, 1986 earthquake.

In the face of these detailed reviews of the design of Perry, OCRE abandoned its initial contention and conceded that the earthquake caused little or no damage to the plant and that the exceedences of the design acceleration "do not have engineering significance." In place of its abandoned argument, OCRE's reply to the Appeal Board alleged, without any evidentiary support whatsoever, that the earthquake established the existence of a "capable fault" as that term is defined in NRC regulations, 10 C.F.R. Part 100, App. A (1986). Both the Utilities' and the NRC Staff's answers to the original motion had, by sworn expert affidavits, shown that the earthquake did not demonstrate the presence of a "capable fault."

In an unpublished Memorandum and Order issued on March 20, 1986, the Appeal Board was unable to conclude that OCRE had met the NRC's three-part test for reopening a closed evidentiary record. However, despite OCRE's concession that the accelerations "do not have any engineering significance" and despite the absence of evidentiary support for OCRE's capable fault assertion, the Appeal Board also said that it was unable "to make an informed judgment on the basis of [the] preliminary written materials." Memorandum and Order at 6. The Appeal Board therefore ordered a hearing to obtain further information "to aid our determination on whether there is warrant to reopen the record." *Id.* at 7. It reached this decision even though OCRE had "not given

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[3] The NRC's independent Advisory Committee on Reactor Safeguards also concluded, based upon hearings held to review the effects of the earthquake, that the earthquake was unlikely to lead to any requirements that would significantly change the design of the Perry plant's structure or its equipment.

us any cause to believe that, were we to admit its new contention for litigation, it would be able to make a substantial contribution to its resolution." *Id.* at 6.

On April 18, 1986, the NRC, acting *sua sponte* under its inherent supervisory authority, vacated the Appeal Board's order setting up the exploratory hearing and denied OCRE's Motion to Reopen. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-07, 23 N.R.C. 233 (1986); Petitioner's Appendix ("Pet. App.") at B1-B17. Citing NRC precedent that "[a] Board is to decide the motion to reopen based on the information before it and has no authority to engage in discovery in order to supplement the pleadings before it," the NRC determined that the Appeal Board's actions "warranted intervention in order to clarify a misinterpretation of Commission case law and precedent." 23 N.R.C. at 234. (Pet. App. at B1-B2). The NRC reiterated that "the burden of satisfying [the] reopening requirements is on the movant" and that the Appeal Board must base its decision "on what is before them." *Id.* at 235. (Pet. App. at B5).

Finding that OCRE had not demonstrated the existence of a significant safety issue, the NRC denied OCRE's Motion to Reopen. *Id.* at 236. (Pet. App. at B8). Noting that "[m]atters which need to be addressed before licensing can be handled by the Commission and its Staff outside of the adjudicatory context," the NRC Commissioners directed their staff to be prepared to discuss the significance of the earthquake at the meeting to be held by the NRC on the Perry full-power operating license. *Id.* (Pet. App. at B7-B8). OCRE and the Utilities were also invited to make and did make presentations at that meeting which was held on September 5, 1986.

On April 23, 1986, OCRE filed in the Court of Appeals for the Sixth Circuit a petition alleging that the NRC's April 18, 1986 order violated the Atomic Energy Act by

denying OCRE an adjudicatory hearing. On August 13, 1986, the NRC published notice that a discussion and possible vote on the issuance of a full-power operating license for Perry would be held on September 5, 1986. 51 Fed. Reg. 29,043. On September 4, 1986, the NRC denied a request from OCRE that the scheduled September 5 meeting be rescheduled. That same day the Court of Appeals stayed the NRC's vote. *Ohio Citizens for Responsible Energy, Inc. v. NRC*, No. 86-3355 (6th Cir. Sept. 4, 1986). (Pet. App. at A1-A3).

After setting an expedited briefing schedule and after hearing oral argument on whether it had jurisdiction over OCRE's petition challenging the Commission's April 18 order, the Court of Appeals issued an Order on October 14, 1986, dissolving the stay and dismissing OCRE's petition for review for lack of jurisdiction. *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 803 F.2d 258 (6th Cir. 1986). (Pet. App. at A4-A10). The Court of Appeals, "guided by well-reasoned precedent from other jurisdictions," found that "the order denying [OCRE's] motion to reopen . . . was not a final order." *Id.* at 259, 260. (Pet. App. at A5, A7). Recognizing that procedural or evidentiary rulings in the course of a licensing proceeding may be challenged in the review of the "final licensing decision," the court concluded "that, in licensing proceedings before the NRC, a final order is the order granting or denying a license." *Id.* at 260-61 (citations omitted). (Pet. App. at A8).

The Court of Appeals did recognize that "interlocutory review may be appropriate under certain circumstances." *Id.* at 260. (Pet. App. at A7). However, because of the absence of documentation from OCRE and the "extensive evidence in opposition," a majority of the panel was persuaded that the NRC's decision was not so "flagrantly wrong" as to justify an exception to the final order requirement. *Id.* at 260. (Pet. App. at A8). The dissenting Judge would have found that the NRC's order

was appealable under the so-called collateral order doctrine. *Id.* at 261. (Pet. App. at A10). On October 23, 1986, OCRE filed a Petition for Rehearing *en banc* which was denied on November 25, 1986. (Pet. App. at A11-A12).

In the meantime, the NRC had issued the full-power operating license for Perry on November 13, 1986. Use of this license was immediately stayed by the Court of Appeals. *State of Ohio ex rel. Celebrezze v. NRC*, No. 86-4019 (6th Cir. Nov. 13, 1986). In addition, both the State of Ohio (raising unrelated issues) and OCRE filed petitions seeking review of the NRC's decision to authorize issuance of the full-power operating license.[4] The three review petitions were consolidated. After full briefing on the merits by all parties, and after hearing oral argument, the Court of Appeals lifted the November 13 stay by an order issued December 23, 1986. On March 17, 1987, the Court of Appeals issued its opinion upholding on the merits the NRC's denial of OCRE's motion to reopen (as well as rejecting the State's petitions). In a well-reasoned decision not now before the Court, the Sixth Circuit found OCRE's position to be "without merit" and denied the petition for review. *See State of Ohio v. NRC*, Nos. 86-4019, -4037, -4038 (6th Cir. Mar. 17, 1987); Utilities' Appendix ("Util. App.") at 1a-14a.

On December 31, 1986, Justice Scalia, as Circuit Justice for the Sixth Circuit, held that he did not have jurisdiction over OCRE's request for review of the Court of Appeals' decision to lift the November 13 stay on the grounds that this order was an unreviewable interlocutory order. Nor could OCRE demonstrate, in Justice Scalia's opinion, sufficient justification to issue an original writ of injunction under the All-Writs Act, 28

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[4] *Ohio Citizens for Responsible Energy, Inc. v. NRC*, No. 86-4037 (6th Cir. filed Nov. 14, 1986) and *State of Ohio ex rel. Celebrezze v. NRC*, No. 86-4019 (6th Cir. filed Nov. 7, 1986) and No. 86-4038 (6th Cir. filed Nov. 14, 1986).

U.S.C. § 1641(a) and Supreme Court Rule 44.1. *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 107 S. Ct. 682 (Scalia, Circuit Justice 1986). On January 8, 1987, Justice Scalia also denied OCRE's application to stay the full-power operation of Perry pending certiorari proceedings in this Court. *Ohio Citizens for Responsible Energy, Inc. v. NRC*, A-499.

## REASONS FOR DENYING THE WRIT

The Court of Appeals' decision that the NRC's denial of a motion to reopen is not a final order is in accord with decisions of this Court and of the courts of appeals. In order to overcome the strong policy interest against interfering with the administrative process, this Court consistently has required that appealable decisions involve significant, concrete injury to a legal right. OCRE cannot meet this requirement. The NRC's order did not terminate its participation in an on-going licensing proceeding and did not grant any right to operate the Perry plant.

Second, judicial review of the NRC's non-final order is not available under the collateral order doctrine. An NRC decision not to reopen the record is but a step towards the final disposition of the merits of a case and does not infringe upon any right which is collateral to the proceeding. In addition, as a party to the licensing proceeding, OCRE was sufficiently protected by its right to appeal the grant of the full-power operating license. Furthermore, because the NRC's decision not to reopen the record was entirely correct, as the Sixth Circuit has now held, there is no need to protect OCRE from being subjected to a clear and manifest injustice.

Third, review of the Court of Appeals' October 14, 1986 decision is unavailable because the issue is moot. Judicial review on the merits of petitioner's claims already has been provided by the Court of Appeals and

those claims have been rejected. It is thus of no value to any party to determine whether those same claims should have been heard one month sooner or were correctly dismissed for lack of a final order.

## I. THE COURT OF APPEALS CORRECTLY FOLLOWED FEDERAL PRECEDENT IN HOLDING THAT DENIAL OF A MOTION TO REOPEN THE RECORD IS NOT A "FINAL ORDER"

Under Section 189(b) of the Atomic Energy Act, 42 U.S.C. § 2239(b) (1982), "final orders" involving the granting, suspending, or amending of Atomic Energy Act licenses are "subject to judicial review in the manner prescribed in the Act of December 29, 1950." That Act, commonly referred to as the Administrative Orders Review Act or the "Hobbs Act," is codified at 28 U.S.C. §§ 2341-2351 (1982) and provides for review by the courts of appeals of "all *final orders* of the Atomic Energy Commission made reviewable by [Section 189 of the Atomic Energy Act]." 28 U.S.C. § 2342(4) (1982) (emphasis added). This provision now applies to the Nuclear Regulatory Commission.[5] In short, the Atomic Energy Act and the Hobbs Act authorize a court of appeals to review only "final orders" from the NRC.

As a general rule, a final order is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). In *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970), the Court applied this principle to administrative proceedings and set forth the "relevant considerations in determining

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[5] *See* 42 U.S.C. § 5871(g) (1982); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 733 (1985).

finality" for purposes of the Hobbs Act.[6] These factors are: (a) whether judicial review will disrupt the orderly process of adjudication; and (b) whether rights or obligations have been determined, or legal consequences will flow from the agency action. *Id.* at 71. These factors have been consistently applied by this Court to review administrative orders. *See, e.g., FTC v. Standard Oil Co.*, 449 U.S. 232, 239-43 (1980); *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 112-13 (1948) ("[A]dministrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.").[7]

OCRE argues (Pet. at 20-21) that denial of its motion to reopen was a final order because it was the last decision on whether there would be an adjudicatory hearing. This argument proves too much. Recognizing that every order is a definitive statement on the subject of the order, the Court in *FTC v. Standard Oil Co.* rejected the argument that to secure judicial review it is sufficient to allege that the administrative agency has made "a definitive statement of [its] position." 449 U.S. at 241. Rather, to be a final order OCRE must show that the NRC decision "inflicts an actual, concrete injury." *E.g., Williamson County Regional Planning Comm. v. Hamilton Bank*, 105 S. Ct. 3108, 3120 (1985).

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[6] Thus, OCRE is simply wrong when it claims that "[t]his Court has not defined 'final order' under the 'Hobbs Act' . . . ." (Pet. at 13-14).

[7] OCRE's attempt (Pet. at 20) to create uncertainty by reference to this Court's recent analysis of the Hobbs Act in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), is without basis. *Florida Power* did not depart from the well-settled method of determining finality. Justice Brennan's opinion only decided that "42 U.S.C. § 2239 vests in the courts of appeals initial subject-matter jurisdiction over [Nuclear Regulatory] Commission orders denying [10 C.F.R.] § 2.206 citizen petitions." 470 U.S. at 746. There was no dispute that such orders were final and no indication that the court applied factors other than those set out in *Port of Boston*.

OCRE's evidence of an "actual, concrete injury" is the unsupported claim that the NRC's order "deprives the petitioner of its right to participate in an adjudicatory hearing" and that "harm and consequences attach to OCRE as a result." (Pet. at 21). This allegation lacks all credence. OCRE was an intervenor in the NRC proceeding and was allowed to participate for over five years in the formal, on-the-record operating license adjudication. Furthermore, OCRE's participation included the opportunity to file the motion to reopen which is the subject of this case. Surely the right to participate does not require that the NRC adopt all of OCRE's positions, and there is no reasonable basis for concluding that denial of a motion to reopen constitutes a denial of participatory rights.

It also is difficult to see how OCRE suffered "actual, concrete injury" since the NRC's April 18, 1986 order was not an opinion on the merits of the full-power license, but merely an interlocutory procedural ruling. In *Chicago & S. Air Lines v. Waterman S.S. Corp., supra*, for example, the Court held that a court of appeals did not have jurisdiction to review an order of the Civil Aeronautics Board granting an air route to petitioner's competitor where the certificate had not been approved by the President. The Court noted review was impermissible even as to a step "which if erroneous will mature into a prejudicial result" since the decision "grants no privilege and denies no right." *See* 333 U.S. at 112. Because the NRC's decision did not conclude the proceeding below as to any party and because it did not authorize any kind of operation of the Perry plant, "[i]t can give nothing and can take nothing away from the applicant or a competitor." *Id.* Like the order in *Chicago & S. Air Lines*, it therefore is not final.[8]

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[8] The type of legal consequence present in cases where this Court has found final agency action stands in sharp contrast to the "harm" which OCRE has suffered. The NRC's order did not "alter and affect adversely contractual rights and business rela-

Rather than address this Court's well-established principles governing what is a final order, OCRE attempts to manufacture a conflict with the Third Circuit based upon the decision in *Westinghouse Electric Corp. v. NRC*, 598 F.2d 759 (3d Cir. 1979). (Pet. at 16-17). In *Westinghouse* the court only was concerned with whether an order "terminating" an NRC hearing on the environmental effects of a program for the commercial recycling of plutonium became final when the order was issued or when the decision explaining the order was issued. Although the court did not decide the issue because it had jurisdiction based either upon the order or the decision, the analysis of the Third Circuit in no way conflicts with the Sixth Circuit's ruling that an NRC order which did not conclude the licensing proceeding and which did not authorize operation of the Perry plant was not a "final order".

More to the point, the Third Circuit's decision in *Citizens for a Safe Environment v. AEC*, 489 F.2d 1018 (3d Cir. 1974), is directly contrary to the OCRE position. There, two intervenors in the administrative proceeding petitioned for review of a Commission order denying a motion for financial and technical assistance. In dismissing the petition, the Court of Appeals stated:

> [A] final order is one that disposes of all issues as to all parties. *See, e.g., Catlin v. United States*, 324 U.S. 229 (1945). . . . Viewed in this light a final order in a licensing proceeding under [Section 189 of

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tions." *Columbia Broadcasting System v. United States*, 316 U.S. 407, 422 (1942). Nor did the order have a "direct and immediate . . . effect on the day-to-day business" as did the labeling regulations in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967), or the approval of a dual rate system for steamship carriers in *Isbrandtsen Co. v. United States*, 211 F.2d 51, 56 (D.C. Cir.), *cert. denied*, 347 U.S. 900 (1954). OCRE cannot even contend, as did the unsuccessful petitioner in *FTC v. Standard Oil Co., supra*, 449 U.S. at 244, that it will suffer "the expense and disruption of defending itself in protracted adjudicatory proceedings" if the NRC's order is not reviewed.

> the Atomic Energy Act] would be an order granting or denying a license.

489 F.2d at 1021. "We conclude," the Third Circuit continued,

> that what is reviewable under [the Atomic Energy and Hobbs Acts] in this court in a licensing proceeding at the behest of a party thereto is a final action on the license. Collateral rulings of the Commission in the course of the proceedings must await review here until that final action is before us.

*Id.* at 1022-23.

A long and uniform line of Circuit Court decisions has recognized the strong policy reasons behind finality and has refused to entertain review of interlocutory NRC orders such as the order currently being contested. In *Thermal Ecology Must Be Preserved v. AEC*, 433 F.2d 524, 526 (D.C. Cir. 1970), the D.C. Circuit held that an order precluding petitioners from offering additional evidence was not a "final order." Quoting from *Thermal Ecology*, the Second Circuit in *Ecology Action v. AEC*, 492 F.2d 998, 1001 (2d Cir. 1974), held that a Commission order excluding certain issues from consideration in a licensing proceeding was not a "final order." In *Natural Resources Defense Council, Inc. v. NRC*, 680 F.2d 810 (D.C. Cir. 1982), the D.C. Circuit dismissed for lack of finality petitions to review an NRC order specifying the procedures to be used in an NRC licensing proceeding. The court explained that "the availability of relief on review of a final order in the license proceeding dictates against judicial review at this time." *Id.* at 816.

Thus, the Sixth Circuit was following well reasoned decisions applying the requirement of the Hobbs Act that decisions be "final orders" before judicial review is sought. There can be no doubt that the agency's decision not to reopen the record based on OCRE's unsupported allegation of significant safety concern was not a "final

order" within the meaning of the Hobbs Act. The order did not conclude the proceeding below as to any party, nor did it authorize any kind of operation of the Perry plant, nor was OCRE precluded from contesting this decision once the full-power operating license was granted —indeed, OCRE now has done that and lost. Immediate judicial review would therefore only interfere with the proper functioning of the NRC and create the burden of delay which the finality requirement is designed to avoid.

## II. THE "COLLATERAL ORDER" DOCTRINE IS NOT AVAILABLE WHERE THE DECISION IS A PRELIMINARY RESOLUTION OF THE MERITS OF THE DISPUTE WHICH THE AGGRIEVED PARTY MAY APPEAL UPON THE ISSUANCE OF A FINAL ORDER

The NRC's decision not to reopen the record is an interlocutory order and "interlocutory orders are not appealable 'on the mere ground that they may be erroneous.'" *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 (1981) (quoting *Will v. United States*, 389 U.S. 90, 98 n.6 (1967)). "Permitting wholesale appeals on that ground [would be] . . . a license for broad disregard of the finality rule . . ." and the important policies it serves. *Id.* Thus, litigants have been required to wait until final judgment before contesting numerous types of procedural rulings. *See, e.g., Flanagan v. United States*, 465 U.S. 259 (1984) (pretrial disqualification of counsel); *Coopers & Lybrand v. Livesay, supra* (denying class certification); *Cobbledick v. United States*, 309 U.S. 323 (1940) (motion to quash subpoena duces tecum).

OCRE nonetheless apparently argues that it is entitled to receive interlocutory review because the NRC's decision not to reopen the record falls within the limited class of prejudgment orders which is sufficiently important and sufficiently separate from the underlying dispute that immediate appeal should be available. (Pet. at 22-25).

To meet the requirements of this exception to the finality rule—known as the collateral order doctrine—the decision "must (i) conclusively determine the disputed question; (ii) resolve an important issue completely separate from the merits of the action; and (iii) be effectively unreviewable on appeal from a final judgment." *Stringfellow v. Concerned Neighbors in Action*, 55 U.S.L.W. 4299, 4301 (U.S. Mar. 9, 1987). Furthermore, "a party seeking appeal must show that all three requirements are satisfied . . . ." *Id.* While OCRE is content to state that the NRC's April 18 order conclusively determined its motion to reopen, the significant question is whether that issue is effectively unreviewable on appeal from the final NRC order authorizing full-power operation or whether that matter is an important issue completely separate from the merits of the NRC's order authorizing operation. In neither case has OCRE made the required showing.

This Court's recent decision in *Stringfellow v. Concerned Neighbors in Action* definitively establishes that OCRE's right to appeal an order granting the Utilities a full-power operating license is both the appropriate method for challenging the NRC decision not to reopen the record and provides sufficient protection of OCRE's hearing rights even if the NRC were later found to be in error. In *Stringfellow*, the respondent had sought to intervene in ongoing litigation concerning a hazardous waste disposal site and had sought review of a district court order which severely limited respondent's right to participate. This Court rejected the intervenor's claim that the district court order was reviewable under the collateral order doctrine. As a party to the suit, the respondent had "the same rights of appeal from a final judgment as all other parties." *Id.* This Court "decline[d] to extend the collateral order doctrine to provide more." *Id.* Since OCRE was a party to the licensing hearing with the right to appeal a final decision under the Hobbs Act (and did, in fact, so appeal), OCRE also can "obtain effective re-

view of its claims on appeal from the final judgment." *Id.*[9]

Nor does the NRC's order satisfy the necessary second prong of the collateral order exception—that the order resolve an important issue completely separate from the licensing of the Perry plant. In those situations in which the doctrine has been applied, the order at issue did not involve the merits of the underlying dispute but involved completely ancillary concerns. *See, e.g.*, cases cited at n.9, *supra*. Here, however, the correctness of the NRC's decision not to reopen the record turns on whether OCRE presented evidence of significant safety concerns which would render a full-power operating license unsafe. The NRC denied the Motion to Reopen because it found that OCRE had failed to raise a significant safety concern. 23 N.R.C. at 235. This issue is the very heart of NRC licensing actions. To issue a license, the NRC must determine that the applicant is "equipped to observe . . . such safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish . . . ." 42 U.S.C. § 2133(b) (1982); *see also* 10 C.F.R. Part 2, App. A, § VIII(b). Thus, resolution of the Motion to Reopen is not collateral because it involves "considerations that are 'enmeshed in the factual and legal issues comprising the . . . cause of action.'" *Coopers & Lybrand v. Livesay*, *supra*, 437 U.S. at 469; *see also FTC v. Standard Oil Co.*, *supra* (issuance of a complaint by the FTC is a step in the process of determining whether petitioner violated the Federal Trade Commission Act and is therefore not appealable).

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[9] Cases where this Court has applied the collateral order doctrine, and has held that appellate review will be ineffective, involve forcing the litigant: (a) to face a risk which the appellate court cannot correct even if it issues an order to that effect, *see, e.g., Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); or (b) to endure a process which will be completed by the time for appeal, *see, e.g., Abney v. United States*, 431 U.S. 651 (1977). Neither circumstance applies here.

Finally, OCRE's complaints do not raise "an important issue." In *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), this Court emphasized this requirement, stating that "[a]s an additional requirement, *Cohen* established that a collateral appeal of an interlocutory order must 'presen[t] a serious and unsettled question.'" *Id.* at 742. Such a question is not present in this case where the only issue is whether the NRC properly exercised its discretion in determining that OCRE did not present sufficient evidence to justify reopening the record. This decision was a finding of fact, reversible only for abuse of discretion. *Oystershell Alliance v. NRC*, 800 F.2d 1201, 1207 (D.C. Cir. 1986). And in this case, the Sixth Circuit has determined in its decision on the merits that the NRC did not abuse its discretion. *State of Ohio v. NRC*, Nos. 86-4019, -4037, -4038 (6th Cir. Mar. 17, 1986). (Util. App. at 1a-14a).

## III. THIS CASE IS RENDERED MOOT BY THE COURT OF APPEALS' REVIEW OF THE NRC'S FINAL ORDER AUTHORIZING THE FULL-POWER OPERATION OF THE PERRY PLANT

OCRE objects to the Sixth Circuit's decision that the court lacked jurisdiction to review an NRC interlocutory order not to reopen the record. That complaint was rendered moot on March 17, 1987, when the Court of Appeals decided that the NRC properly denied OCRE's motion. After that point, no controversy exists between the parties as to whether the NRC decision not to reopen the record was or was not a final order. OCRE has received the judicial review it is seeking in this case, and a decision by this Court that judicial review should have been completed earlier cannot now affect the rights of the parties.

Article III of the Constitution requires that a federal court adjudicate only a currently existing "case or controversy." *Burke v. Barnes*, 107 S. Ct. 734, 736 (1987).

Federal courts are therefore prohibited from rendering advisory opinions which cannot affect the rights of litigants before them. *Id.*; *see also Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Even if a case or controversy is "live" at the time of the initial litigation, a court may not render an opinion if subsequent events have mooted the question presented. *See, e.g., Burke v. Barnes*, *supra*; *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Where full relief has been provided, a proceeding seeking similar relief cannot affect the rights of the parties before it and, therefore, is moot. *Washington Market Co. v. District of Columbia*, 137 U.S. 62 (1890) (per curiam); *Natural Resources Defense Council, Inc. v. NRC*, *supra*, 680 F.2d at 814-15.

Although OCRE's petition for a writ of certiorari does not specify the relief it desires, the only conceivable relief is a decision that the Court of Appeals had jurisdiction to review the NRC's denial of OCRE's motion to reopen prior to issuance of the full-power operating license and, furthermore, an order from this Court remanding the case to the Court of Appeals for a decision on the merits. When the Sixth Circuit on March 17, 1987, in *State of Ohio v. NRC*, Nos. 86-4019, -4037, -4038 (6th Cir. Mar. 17, 1987) (Util. App. at 1a-14a), decided that the NRC "reasonably exercised its discretion" in denying OCRE's motion to reopen, the case was rendered moot.

## CONCLUSION

For all the foregoing reasons, OCRE's petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 26, 1987

# APPENDIX

**APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Nos. 86-4019, 86-4038, & 86-4037

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STATE OF OHIO (86-4019 & 86-4038) and
OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC.
(86-4037),
*Petitioners*,

v.

NUCLEAR REGULATORY COMMISSION, and
UNITED STATES OF AMERICA,
*Respondents*,

CLEVELAND ELECTRIC ILLUMINATING COMPANY,
DUQUESNE LIGHT COMPANY, OHIO EDISON COMPANY,
PENNSYLVANIA POWER COMPANY, and
TOLEDO EDISON COMPANY,
*Intervenors*.

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Petition To Review Orders of the
Nuclear Regulatory Commission

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Decided and Filed March 17, 1987

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Before: ENGEL, JONES, and RYAN, Circuit Judges.

RYAN, Circuit Judge, delivered the opinion of the court, in which ENGEL, Circuit Judge, joined. JONES, Circuit Judge, (pp. 13a-14a) delivered a separate concurring opinion.

RYAN, Circuit Judge. Petitioners seek to overturn three orders of the Nuclear Regulatory Commission (the NRC):

1. Petitioner State of Ohio appeals an order of the NRC denying leave to intervene in licensing proceedings pertaining to the Perry Nuclear Power Plant (the plant);

2. Petitioner Ohio Citizens for Responsible Energy, Inc. (OCRE) appeals an order of the NRC denying its motion to reopen the record in the plant licensing proceedings; and

3. Both petitioners appeal the NRC's order authorizing the plant's full-power operating license.

The issue is whether the NRC reasonably exercised its discretion in making these determinations. We hold that it did, and affirm all three orders.

## I

In 1980, intervenor Cleveland Electric Illuminating Company (CEI) and other public utilities applied to the NRC for a license to operate the Perry Nuclear Power Plant on the shore of Lake Erie in Northern Ohio. The NRC granted party status to OCRE and other interested parties in 1981. The State of Ohio did not seek to participate at that time.

Hearings were held pursuant to the Atomic Energy Act, 42 U.S.C. § 2239(a) (1973), in 1983 and 1985. No party to the proceedings raised the issue of the plant's capacity to withstand earthquakes. The adequacy of emergency planning was challenged by Sunflower Alliance, an intervenor in the proceedings, and was ultimately approved by the NRC. The record was closed on May 3, 1985.

On January 31, 1986, an earthquake of magnitude 5.0 on the Richter scale occurred approximately ten miles away from the plant. On February 3, 1986, OCRE filed a motion to reopen the record to consider the capacity of the plant's structures to resist seismic activity of this magnitude. In support of its motion, OCRE submitted a newspaper article reporting that vibratory ground motion at the plant during the earthquake had exceeded the peak acceleration for which the plant had been designed.

The NRC staff studied the available data and determined that, while the earthquake was severe and was different in some respects from the archetype of earthquake motion used in designing the plant structures, the high frequency energy levels that had exceeded the "design spectrum" for ground motion did not raise a serious safety concern. The plant had been designed to withstand earthquakes with magnitudes of 5.3 ± 0.5 because the most severe earthquake in the pertinent geographical zone, the 1937 Anna, Ohio, earthquake, had an estimated magnitude of 5.0-5.3.

The appeal panel to which OCRE's contentions were submitted, recognizing the highly technical nature of the issues, scheduled an exploratory hearing in order to fully consider OCRE's claims. The NRC, however, determined that such a hearing was not appropriate and, because OCRE had failed to support its motion with evidence sufficient to merit reopening the record, ordered that the motion be denied. OCRE has appealed this denial.

The January, 1986, earthquake also stimulated new concerns on the part of the Governor of Ohio. These concerns were heightened by the April, 1986, nuclear accident at Chernobyl, in the Soviet Union, and eventually focused upon the adequacy of the emergency preparedness plans for Ohio's commercial nuclear reactors. On August 15, 1986, the Governor appointed a cabinet-level task force to review the adequacy of the evacuation

plan which had previously been prepared by Ohio authorities with a view to the eventual full-power operation of the plant. On the same day, the Governor informed the NRC that he was withdrawing his support for the plan. He requested that the NRC delay its vote on full-power licensing until after the task force report was complete. The task force was given a due date of December 31, 1986. We have not been advised at this writing whether the report has been completed or, if completed, released.

While maintaining informal communications with the NRC about its concerns and the progress of the task force's investigation, Ohio also sought formal intervention in the proceedings on September 5, 1986, as an "interested state" under 10 C.F.R. § 2.715 (1986). On October 29, Ohio submitted preliminary findings of the task force to the NRC, requesting that full-power licensing be delayed until the report was completed and the emergency plan could be revised accordingly. On October 30, the NRC denied Ohio's motion to intervene. Ohio has appealed this denial.

Meanwhile, the NRC's final vote on the plant's full-power license, originally scheduled for September 4, was stayed by this court at the instance of OCRE, which contended that it had a right to appeal the denial of its motion to reopen the record prior to that vote. On October 14, this court rejected OCRE's petition for review on the ground that the denial was not a final agency order. *Ohio Citizens for Responsible Energy, Inc. v. NRC*, No. 86-3355, slip op. (6th Cir. Oct. 14, 1986). Accordingly, the stay was lifted.

On November 7, as the NRC prepared to conduct the vote on full-power licensing, Ohio petitioned this court to review the NRC's denial of Ohio's motion to intervene and also sought an emergency stay of the vote pending review. The vote proceeded, and the license was granted. Ohio and OCRE both sought review in this court of the

NRC's final order granting the full-power operating license.

Although the license was issued on November 13, 1986, this court immediately ordered that implementation of full-power operation be stayed pending our review of these appeals. The plant thus continued operating at 5% capacity, as it had before the license was issued, rather than beginning the gradual escalation to 100% capacity authorized by the license.

On November 14, we consolidated and expedited the appeals of Ohio and OCRE. Oral argument was heard on December 3. On December 12, 1986, the five intervenor utilities moved the court to lift the stay, claiming that the "costs of delaying plant operations are accumulating at approximately $2.2 million per day or more than $40 million to date." The motion was opposed by the State of Ohio. We lifted the stay on December 23, 1986, Judge Jones dissenting. An application to the United States Supreme Court by OCRE to stay the mandate of our order lifting the stay was denied on December 31, 1986, in an opinion of Justice Scalia.

## II

OCRE contends that the NRC's refusal to reopen the record in response to its request following the January, 1986, earthquake illustrates two chronic bureaucratic evils: first, the agency's inclination to shut the public out of the decision-making process, confident in the sufficiency of its own knowledge and expertise; and second, the agency's impatience with the pace of the democratic decision-making process imposed upon it by statute, which inclines the NRC to dispense with any procedure, however well-founded, that threatens delay.

In this case, these contentions are without merit. The agency proceedings in this case do not suggest an intolerance for public participation on the part of the NRC.

The statutory scheme requires hearings to be held only upon those issues interested parties raise before the NRC in a timely manner. In the absence of a request, no hearings need be held at all. 42 U.S.C. § 2239(a)(1). Safety concerns not raised in public hearings must nonetheless be addressed by the NRC staff.

In this case, seismic considerations were not raised by OCRE or any other participant in the public licensing hearings. Accordingly, the NRC staff addressed this issue on its own in accordance with the NRC's Seismic and Geologic Siting Criteria for Nuclear Power Plants, 10 C.F.R. Part 1, App. A. Thus, the NRC's reluctance to reopen the record on this issue does not imply either a high-handed disdain for public comment or a lack of concern for the seriousness of the issue. Rather, it indicates only that the public comment period was closed, and that the NRC had not been convinced that OCRE had a significant contribution to make to further staff analysis.

True, new data, in the form of an unexpected earthquake, had appeared since the closing of the record. However, in the absence of some showing that OCRE could assist materially in the analysis of that new data, there is no reason why that event, of itself, would require the record to be reopened. One of the purposes of the NRC's discretionary option to refuse reopening the record is to assure that the party who would reopen the record offers such material assistance rather than a mere continuation or rehash of the process ostensibly terminated when the record was closed initially.

"Under Commission practice, reopening is required when *new evidence* is shown to be *timely*, *safety significant*, and sufficiently *material* to have changed the result initially taken." *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1318 (D.C. Cir. 1984) (emphasis in original), *aff'd*, 789 F.2d 26 (D.C. Cir. 1986) (en banc). Here, OCRE's motion was conceded to be timely,

but the NRC held that OCRE had not shown safety significance.

At the time of its motion, OCRE submitted only a newspaper article in support of its claims. Even if the NRC had permitted the appeal panel to proceed with its exploratory hearing, OCRE planned to offer no information or analysis of its own, but intended instead to conduct a cross-examination of witnesses presented by CEI and the NRC staff. Furthermore, OCRE had conceded that the January earthquake did little or no damage to the plant and "that the high frequency exceedances of the SSE [Safe Shutdown Earthquake] design acceleration recorded in the January 31, 1986 earthquake do not have engineering significance." Instead, OCRE sought to introduce a new theory, based on the improbable contention that a discoverable "capable fault" (as defined in 10 C.F.R. Part 1, App. A, III(g)) caused the earthquake, even though such faults have rarely been identified east of the Rocky Mountains, and that the NRC staff had accordingly applied the wrong standards in making its seismic calculations.

In the face of this claim, palpably lacking in proof, the NRC staff opposed an extensive study purporting to answer OCRE's contentions in an exhaustive and technical manner.

Although we recognize the possibility that the pace of events and the implications of new information and developments may at times outstrip the relatively fixed agenda of an entrenched bureaucracy, and while we would not equate the absence of hard data in a case such as this with the absence of a threat to public safety, the fact remains that OCRE has made no showing that it has anything to contribute to the analysis of the plant's seismic security and only the barest of allegations that the January, 1986, earthquake has undermined the technical premises of the plant's structural design. Despite

the appeal panel's willingness to give OCRE an opportunity to flesh out these allegations, we do not consider the NRC's decision to dispense with that opportunity necessarily to indicate unseemly haste.

*Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983), involved a challenge to the NRC's approach to evaluating the environmental impact of the storage of certain nuclear wastes. In this context, the Court observed that

> "a reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."

*Id.* at 103. Arguably, somewhat less deference is appropriate here, but the fact remains that our role in reviewing NRC denials of requests to reopen the record is quite limited:

> "Where as here the agency has taken final action on a matter that is perculiarily within its realm of expertise, we will not require the agency to reopen its proceedings except upon a clear showing of abuse of discretion or of extraordinary circumstances."

*Mobil Oil Corp. v. ICC*, 685 F.2d 624, 632 (D.C. Cir. 1982).

A failure of the NRC to follow its own guidelines would constitute an abuse of discretion, *see San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1318 (D.C. Cir. 1984), *aff'd*, 789 F.2d 26 (D.C. Cir. 1986) (en banc), but the NRC's action here was expressly premised upon a well-founded conclusion that OCRE had failed to show that new data resulting from the January, 1986, earthquake were safety significant. Evidently, OCRE was surprised by the NRC's procedure of inter-

jecting itself into the reopening petition process and cancelling the exploratory hearing scheduled by the appeals panel. However, so long as the decision to reopen is committed to the NRC's discretion, no intervenor can claim an entitlement to an exploratory hearing the NRC reasonably deems to be unnecessary.

III

NRC regulations delegate responsibility for developing off-site emergency plans to state and local governments. 10 C.F.R. § 50.47. These regulations provide in part:

> "(a)(1) Except as provided in paragraph (d) of this section, no operating license for a nuclear power reactor will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.
>
> "(2) The NRC will base its finding on a review of the Federal Eemrgency Management Agency [FEMA] findings and determinations as to whether State and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented, and on the NRC assessment as to whether the applicant's onsite emergency plans are adequate and whether there is reasonable assurance that they can be implemented."

The emergency plan for the Perry plant was developed by the State of Ohio, which now contends that the plan is seriously inadequate.

Ohio seeks to intervene in the plant's licensing proceedings, citing 10 C.F.R. § 2.715(c), which provides in part:

> "The presiding officer will afford representatives of an interested State, county, municipality, and/or agencies thereof, a reasonable opportunity to participate and to introduce evidence, interrogate wit-

> nesses, and advise the Commission without requiring the representative to take a position with respect to the issue."

This regulation preserves the right of a state to participate in licensing hearings, but does not address the state's rights once the hearings have been completed and the record closed. Thus, the state's belated request to intervene must be considered by this court in light of the limited "abuse of discretion" standard of review otherwise applicable to requests to reopen the record, as set forth above.

Ohio contends, however, that the NRC has abused its discretion in denying it leave to intervene. Ohio claims it is not an opponent of nuclear power, and has no intention of holding up plant operations indefinitely. On the contrary, Ohio asked only for a delay in full-power operation until the end of 1986 so that the emergency plan could be fully studied and revisions could be undertaken. Ohio's request was not unreasonable. This court takes judicial notice of the fact that the stays we have imposed have come very close to rendering this issue moot despite our best efforts to resolve this matter expeditiously.

We recognize also that Ohio's responsibility for the safety of its inhabitants is unquestionably deserving of this court's consideration. In view of this responsibility, the untimeliness of Ohio's action and its failure to participate in the earlier public hearings would be entirely insufficient as grounds for NRC action dispensing with Ohio's concerns. The NRC, however, has neither ignored Ohio's contentions nor acted unreasonably in denying leave to intervene.

First, we note that Ohio's responsibility is entirely with *off-site* emergency preparations. These preparations may proceed apace regardless of the operational status of the plant.

Second, while the regulatory scheme was clearly designed to prevent full-power licensing until the NRC finds that there is "reasonable assurance" that the emergency plan is adequate, the NRC has in fact made a finding to this effect. Many of Ohio's more specific concerns were raised in the public hearings by intervenor Sunflower Alliance. Ohio's newfound misgivings are troubling, but do not necessarily undercut the reliability of the NRC's finding.

Finally, issuance of a license does not preclude Ohio from proceeding with research, oversight, and revisions in any portions of the emergency plan perceived as inadequate. Furthermore, 10 C.F.R. § 2.206 gives any person the right to institute a proceeding to "modify, suspend or revoke a license." While we recognize that it may be more difficult to shut a plant down than to prevent initial licensing, the procedure provided for by § 2.206 appears to provide an adequate remedy for any grave safety shortcomings Ohio may henceforth discover and document.

These considerations persuade us that the NRC acted reasonably in denying Ohio's request to intervene in the full-power licensing proceedings.

## IV

Aside from the allegations contained in OCRE's petition to reopen the record and Ohio's petition for leave to intervene, we are presented with no basis upon which the NRC's decision granting the full-power operating license should be reversed. Accordingly, petitioners' objections to this decision must also be rejected.

## V

Our treatment of the issues raised on this appeal is conditioned by the very limited role Congress has assigned to the courts in the statutory scheme regulating

the construction and operation of commercial nuclear power plants. As the Supreme Court has observed:

> "We are acutely aware that the extent to which this Nation should rely on nuclear power as a source of energy is an important and sensitive issue. Much of the debate focuses on whether development of nuclear generation facilities should proceed in the face of uncertainties about their long-term effects on the environment. Resolution of these fundamental policy questions lies, however, with Congress and the agencies to which Congress has delegated authority, as well as with state legislatures and, ultimately, the populace as a whole. Congress has assigned the courts only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes. As we emphasized in our earlier encounter with these very proceedings, '[a]dministrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute . . ., not simply because the court is unhappy with the result reached.' Vermont Yankee, 435 US, at 558, 55 L Ed 2d 460, 98 S Ct 1197 [1978]."

*Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983). The NRC acted within the confines of its statutory discretion in making the three decisions challenged by these appeals. This court is therefore required to uphold those decisions.

VI

The orders of the NRC appealed from are AFFIRMED.

JONES, Circuit Judge, concurring. The opinion of the court in this case sets out as good a basis for affirming the Nuclear Regulatory Commission's orders as can be done. Because I am persuaded that the scope of judicial review delineated by the Supreme Court in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983), and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), is extremely narrow, I concur in today's result. Nonetheless, I am sufficiently alarmed by the events that gave rise to the instant proceedings to write separately.

The court's opinion summarizes OCRE's description of the NRC's "bureaucratic evils" as:

> first, the agency's inclination to shut the public out of the decision-making process, confident in the sufficiency of its own knowledge and expertise; and second, the agency's impatience with the pace of the democratic decision-making process imposed upon it by statute, which inclines the NRC to dispense with any procedure, however well-founded, that threatens delay.

The majority of this panel finds no merit in such a description. However, if the proceedings in this case are any indication of the Commission's standard practice, I think that the description is quite accurate. From my perspective, there is no better way to characterize the Commission's *sua sponte* order vacating the Appeal Panel's order scheduling an exploratory mini-hearing. The purpose of that mini-hearing was to determine whether the unexpected and uncharacteristically strong earthquake raised significant safety issues warranting a reopening of the record.

The Commission's treatment of the State of Ohio's concerns with the adequacy of the off-site emergency preparedness plan is even more disconcerting. The NRC's

argument in support of its denial of the State's motion to intervene boils down to the following: While it is not too late for the State to make improvements in the existing off-site emergency plan that it fears may be seriously inadequate in certain respects, it is in fact too late for the State to guarantee the safety of its citizenry by temporarily delaying the issuance of Perry's full-power license pending the completion of its formal review. Granted, the Commission is not legally *required* to further stay the plant's full-power operation since it has satisfied itself that the existing off-site plan is adequate. However, that it not really the point. Where, as here, the State has expressed bona fide concerns for the safety of its people and has in good faith undertaken affirmative investigatory measures, it is at best patronizing for the Commission to turn a deaf ear to the State's plea for a brief delay. While the Nuclear Regulatory Commission may be secure in its belief that it is the ultimate protector of the American people generally, and of the people of Ohio specifically, from the hazards of nuclear power generation, I do not think that Congress ever intended for the Commission to have this type of one-sided relationship with a sovereign State over a serious matter of local health and safety.